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## Enough Is Enough : Ten Years of *Carcieri v . Salazar*

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## **Enough Is Enough: Ten Years of *Carcieri v. Salazar***

**Bethany C. Sullivan\***

**Jennifer L. Turner\*\***

*Ten years ago, the United States Supreme Court issued its watershed decision in *Carcieri v. Salazar*, landing a gut punch to Indian country. Through that decision, the Supreme Court upended decades of Department of the Interior regulations, policy, and practice related to the eligibility of all federally recognized tribes for the restoration of tribal homelands through the Indian Reorganization Act (IRA) of 1934. The Court held that tribes must demonstrate that they were “under federal jurisdiction” in 1934 to qualify for land into trust under the first definition of “Indian” in the IRA. *Carcieri* has impacted all tribes by upending the land-into-trust process and requiring tribes (and Interior) to spend scant resources to establish statutory authority for trust land acquisitions, a burdensome task that had previously been straight forward. In addition, *Carcieri* has complicated, if not prevented altogether, trust acquisition for tribes who face difficulty in making the requisite jurisdictional showing.*

*This Article provides the first comprehensive analysis of the last ten years of Indian law and policy that have unfurled from the Supreme Court’s decision. It describes how *Carcieri* has been weaponized by states, local governments, citizens’ groups, individuals, corporations, and even other tribes, to challenge the exercise of tribal sovereignty through the*

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*acquisition of tribal lands, and, at times, the very existence of Indian tribes. This Article details the litigation that has since ballooned, illustrating the dangerous scope creep of Carcieri, while categorizing and evaluating the underlying claims. It also looks to the future, and concludes that, while unlikely, a universal, clean congressional fix is the only real solution. The last ten years of litigation, hearings, and never-ending debate demonstrate that Carcieri is not a constructive or appropriate framework for resolving larger policy questions about the land-into-trust process. Finally, the Article ends by providing practice tips for tribes navigating the current Carcieri landscape.*

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## I. INTRODUCTION

Ten years ago, the United States Supreme Court issued its decision in *Carcieri v. Salazar*,<sup>1</sup> landing a gut punch to Indian country. The Supreme Court upended decades of Department of the Interior (“Department” or “Interior”) regulations, policy, and practice by holding that tribes must demonstrate that they were “under federal jurisdiction” in 1934 to qualify for land into trust under the first definition of “Indian” in the Indian Reorganization Act (“IRA”).<sup>2</sup> In so doing, the Court took aim at the critical ability of tribes to amass a land base over which to exercise jurisdiction—and effectively divided tribes into the haves and the have

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1. 555 U.S. 379 (2009).

2. *Id.* at 382. *Carcieri* is often mischaracterized as requiring tribes to demonstrate that they were under federal jurisdiction to qualify for land-into-trust, full-stop. As explained further in this article, that assertion ignores the plain language of the decision, other definitions of “Indian” in the IRA, as well as numerous alternative statutes authorizing land into trust for specific tribes. Therefore, we are careful in this article to tie the holding of *Carcieri* to the first definition of “Indian” in the IRA only.

nots. The “haves” consist of those tribes whose history readily demonstrates they were under federal jurisdiction in 1934, while the “have nots” consist of those tribes who, through historical realities, face difficulty in making such a showing. Moreover, the decision impacted *all* tribes by complicating and slowing down the land-into-trust process and requiring tribes (and Interior) to spend scant resources to establish statutory authority for trust land acquisition, a burdensome task that had previously been straight forward.

*Carcieri* has been weaponized by states, local governments, citizens’ groups, individuals, corporations, and even other tribes, to challenge the exercise of tribal sovereignty through the acquisition of tribal lands, and, at times, the very existence of certain Indian tribes. It has become a guise for anti-tribal, anti-gaming, and anti-competition sentiments, giving tribal opponents another platform on which to raise larger questions of federal Indian law and policy on their terms. Are all tribes equal? Do tribes need more land? Is the fee-to-trust process broken? Should states and local governments have a veto power over fee-to-trust decisions?

Underlying these concerns is the specter of unfairness, that tribes are somehow gaining an unfair advantage via the land-into-trust process, gaming authorizations, and federal laws and policies aimed at promoting tribal welfare. This mindset seeps through the language of court briefs, congressional testimony, and apoplectic statements by anti-tribal gaming groups. Yet the specter is just that, an apparition of a false reality. It ignores the historical seizure of tribal lands, the unique development of the federal-tribal relationship, fundamental principles of tribal sovereignty, and perhaps above all else, the inherently *unfair* playing field on which tribes have been forced to play.

This Article comprehensively examines the ten years of Indian law and policy that have unfurled from the *Carcieri* decision, while providing tribal practitioners a primer on the land-into-trust process and a litigation toolkit. First, this Article provides the necessary history of the IRA and the land-into-trust regulatory process. Second, it describes the impetus behind and legal ramifications of the 2009 Supreme Court decision in *Carcieri v. Salazar*. Third, it explains the immediate public, congressional, and executive responses to this watershed decision. Fourth, it details the litigation that has since ballooned, illustrating the scope creep

of *Carcieri*, while categorizing and evaluating the underlying claims.<sup>3</sup> The Article further notes that, despite protests of some members of Congress and fee-to-trust opponents, courts have overwhelmingly affirmed Interior's response to *Carcieri*, including its legal framework and fee-to-trust decisions.

Finally, this Article looks to the future, considering pending litigation and proposed congressional and agency action. The Article concludes that while unlikely, a universal, clean congressional fix is the only real solution. The last ten years of litigation, hearings, and debate demonstrate that *Carcieri* is not a constructive or appropriate framework for resolving larger policy questions about the land-into-trust process. The Article also concludes with practice tips for tribal attorneys navigating the hazardous *Carcieri* landscape for the indeterminable future.

## II. HISTORY OF THE IRA AND THE FEE-TO-TRUST PROCESS

A rich body of scholarship already exists concerning the history of the IRA and the machinery it created to facilitate the re-acquisition of Indian lands.<sup>4</sup> Yet its importance to Indian country cannot be overstated and therefore bears repeating here. The following section outlines the history of the IRA, its statutory contours, and the resultant regulatory procedures for land acquisitions.

Beginning with congressional enactment of the General Allotment Act in 1887, the federal government unilaterally imposed a policy of assimilation and allotment, breaking up communal tribal landholdings into individual allotments.<sup>5</sup> The federal government was to hold these

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3. This litigation and associated claims have led one judge on the District of Columbia Circuit Court of Appeals to exclaim “[e]nough is enough!” in dismissing a *Carcieri*-based challenge to the very existence of a tribe. *Stand Up for California! v. U.S. Dep’t of Interior*, 879 F.3d 1177, 1186 (D.C. Cir. 2018), *cert. denied*, \_\_\_ S.Ct. \_\_\_ (2019).

4. See, e.g., THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS (Vine Deloria ed. 2002); ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT (2000); INDIAN SELF-RULE (Kenneth R. Philip, ed., 1986).

5. General Allotment Act of Feb. 8, 1887, 24 Stat. 388, ch. 119 (1887) (General Allotment Act); see also William Wood, *Indian, Tribes, and (Federal) Jurisdiction*, 65 KAN. L. REV. 415, 458 (2016) (describing the allotment policy and how allotted reservation lands were “subject to federal oversight and restrictions

allotments in trust for a period of 25 years or until the Indian beneficiary could demonstrate “competency” to hold title in fee simple.<sup>6</sup> The remainder of tribal lands were considered “surplus” to Indian needs, and procedures were established to dispose of such “surplus” lands to the growing mass of non-Indian homesteaders.<sup>7</sup>

By enacting the General Allotment Act, Congress hoped to eliminate communal land tenure and attendant tribal authority in favor of private landholdings and assimilation modeled on the western ideals of the independent farmer and rancher.<sup>8</sup> This policy, however, proved to be a categorical disaster.<sup>9</sup> In the course of nearly 50 years, tribal and Indian

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against alienation, and federal bureaucrats managed individual Indians' property interests”); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 16.03[2][b] (Nell Jessup Newton et. al. eds. 2017).

6. General Allotment Act § 5 as modified by the Burke Act of 1906, 34 Stat. 182, ch. 2348; *see also* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 521 (2013) (explaining that during the 25 year trust period, allotments could not be sold and were immune from local property taxes).

7. General Allotment Act § 5, codified at 25 U.S.C. § 348; *see also* D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 8 (Francis P. Prucha ed., Univ. of Okla. Press, 1973) (“The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indians are but a pretext to get at the lands and occupy them.”) (citing an 1880 House Indian Affairs Committee minority report).

8. *See* FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 224–27 (abridged ed., 1986) (explaining the near religious belief that Indian “civilization was impossible without the incentive to work that came only from individual ownership of a piece of property”); Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 447–48 (2002/2003) (describing the federal policy on allotment and assimilation, and quoting President Chester A. Arthur’s proposal “to introduce among the Indians the customs and pursuits of civilized life and gradually to absorb them into the mass of our citizens” as a method of solving the “Indian problem”) (internal citation omitted).

9. *See generally* The Problem of Indian Administration, The Inst. for Gov’t Research (Dept. of Interior 1928) (“Meriam Report”); *id.* at 7 (“[P]olicies adopted by the government in dealing with Indians have been of a type which, if long continued, would tend to pauperize any race”). *See also* Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291 (2001) (describing how the General Allotment Act “left a severe

lands diminished by over two-thirds, from roughly 138 million acres to 48 million acres.<sup>10</sup> Valuable lands fell into the hands of speculators and white settlers, while Indians who were able to hold on to their allotments were often left with lands ill-suited for agriculture and without the necessary tools, supplies, and instruction.<sup>11</sup> As a result, many Indians became landless and destitute, further suffering from social, psychological, and cultural impoverishment.<sup>12</sup> Reservations transformed into checkerboards, dotted with lands held by the tribe, individual Indians, white settlers, and corporations, which created cultural conflict.<sup>13</sup> Individual Indian allotments often became fractionated into dozens, sometimes hundreds, of interests due to the inalienability of the property and the laws of intestacy.<sup>14</sup> Tribal governmental institutions were undermined by loss of communal lands, influx of non-Indians, and burgeoning administrative control by the federal government.

In response to the dire state of Indians across the country, and in repudiation of the allotment policy, Congress passed the IRA in 1934.<sup>15</sup> The IRA was enacted to, among other purposes, “conserve and develop Indian lands and resources,” “extend to Indians the right to form business

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and traumatic legacy for Indian nations”); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 10–15 (Spring 1995).

10. See *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Comm. on Indian Affairs*, 73d Cong. 15–18 (Feb. 22, 1934) [hereinafter *Hearings on H.R. 7902*].

11. See Royster, *supra* note 9, at 12–14 (describing how thousands of individual Indian allottees lost their lands by voluntary or fraudulent sales or for non-payment of taxes and, further, how the remaining “surplus” lands were wrested from tribes at the behest of western politicians and white settlers); Pommersheim, *supra* note 6, at 522 (explaining that the Allotment Act was “grossly undercapitalized, sometimes providing less than ten dollars per allottee for implements, seeds, and instructions,” and, moreover, that it was “insensitive to the hunting and food-gathering traditions of nonagricultural tribes”).

12. See McCoy, *supra* note 8, at 448–49.

13. Pommersheim, *supra* note 6, at 522–23.

14. *Id.* at 522; PRUCHA, *supra* note 8, at 297–98.

15. Indian Reorganization Act of June 18, 1934, 48 Stat. 984. See generally RUSCO, *supra* note 4. This legislation has been referred to as the “Indian New Deal,” in recognition of its place alongside the generally applicable New Deal legislation designed to ameliorate the national economic depression. See generally GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-1945* (1980).



and other organizations,” and “grant certain rights of home rule to Indians.”<sup>16</sup> Through this legislation, Congress intended to “establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, politically and economically.”<sup>17</sup> In other words, the IRA radically changed the course of federal Indian policy by arming tribes with the necessary legal mechanisms to strengthen tribal government institutions and rebuild tribal resources. Congress hoped the IRA would reduce the bloated—and costly—federal administrative state over Indian affairs by encouraging tribal and individual Indian self-sufficiency.<sup>18</sup>

The cornerstone of this remedial legislation was Section 5, now codified at 25 U.S.C. § 5108, which authorized the Secretary of the Interior to acquire lands “within or without existing reservations” for the “purpose of providing land for Indians.”<sup>19</sup> Such acquired lands are held in trust by the federal government on behalf of the tribal or individual Indian beneficiary and exempt from state and local taxation.<sup>20</sup> By authorizing tribal land acquisitions under Section 5, Congress hoped to reverse the “disastrous condition” of the Indians resulting from the allotment policy.<sup>21</sup> Furthermore, Congress recognized the critical link between Indian lands and the rehabilitation of Indian economies and tribal governance structures—that in order to govern well and provide economic opportunity, tribes must have a territorial home base.<sup>22</sup> Accordingly, trust

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16. 48 Stat. 984 (1934).

17. *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

18. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS*, *AMERICAN JUSTICE* 14 (1997) (explaining that the “major thrust” of the IRA was to “minimize the enormous discretion and power exercised by the Department of the Interior” and transfer such power to tribal governments); see also PRUCHA, *supra* note 8, at 263 (finding that “the paternalism of the federal government, which was supposed to end when the individual Indians disappeared into the dominant American society, increased instead of diminished, until the bureaucracy of the Indian Service dominated every aspect of the Indians’ lives” during the allotment era).

19. 25 U.S.C. § 5108 (2018).

20. *Id.*

21. Hearings on H.R. 7902, *supra* note 10 (statement of Commissioner of Indian Affairs John Collier).

22. See MCCOY, *supra* note 8, at 423 (explaining that “[t]ribes share a meaningful relationship with tribal land because it is homeland and sacred land, which provides a sense of cultural, religious, and ethnic identity and community well-being.” McCoy further explains that “tribes are also attached to the land because it provides a

lands are largely removed from state and local regulatory authority and, instead, fall within the tribe's jurisdiction.<sup>23</sup>

Another critical IRA provision is Section 19, identifying those who are eligible for the IRA's benefits. Section 19 provides that "tribe" signifies "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."<sup>24</sup> In turn, Section 19 includes three definitions of "Indian":

[A]ll persons of Indian descent who are [1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.<sup>25</sup>

Section 18 of the IRA is also significant. That section, now inoperative, required the Secretary to hold elections regarding application of the IRA to each reservation.<sup>26</sup> The "majority of the adult Indians on a reservation" could vote against the application of the IRA to the

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space within which they can exist as autonomous nations—supplying a sense of political and national identity as well.”).

23. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at § 3.04; *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005) (describing § 5 of the IRA as the “proper avenue to reestablish sovereign authority over territory”); MCCOY, *supra* note 8, at 445 (explaining that “land taken into trust via Part 151 becomes ‘Indian country’ (subject to the authority of tribes, generally exempting such land from state taxation and other laws)”). Some state and local governments oppose fee-to-trust applications on the basis that trust acquisition removes state jurisdiction and taxation, *infra* note 118, but others enter into intergovernmental agreements with tribes to address the impacts of trust land acquisition. See 78 Fed. Reg. 67928, 67932 (Nov. 13, 2013) (noting that state and local governments may negotiate with tribes to resolve disagreements surrounding trust land acquisition). See generally David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations' Self-Government*, 1 REV. CONST. STUD. 120 (1993) (describing the history and usefulness of intergovernmental agreements between tribes and their neighboring governments).

24. See 25 U.S.C. § 5129 (2018).

25. *Id.*

26. 25 U.S.C. § 5125 (2018).

reservation. The Secretary was required to conduct these votes within one year of the enactment of the IRA, which Congress later extended until June 18, 1936.<sup>27</sup> Originally, a tribe that voted against the IRA could not take advantage of the trust land provision in Section 5; however, in 1983, Congress amended the IRA to provide that Section 5 applies to “all tribes notwithstanding section [18].”<sup>28</sup>

In the decades immediately following the IRA’s enactment, the Department exercised its Section 5 authority in a limited fashion, accepting land into trust via an unpublished agency process.<sup>29</sup> Yet the dawn of the self-determination era brought with it an uptick in Section 5 land acquisitions,<sup>30</sup> generating the need for a clear, uniform, and publicly-developed Departmental process.<sup>31</sup> Accordingly, the Department promulgated the first set of land acquisition regulations through notice-and-comment rulemaking in 1980.<sup>32</sup> In 1995, the Department revised the regulations, imposing additional procedural requirements for off-reservation land acquisitions.<sup>33</sup> It is this iteration of the regulations that largely stands today and which can be found at 25 C.F.R. Part 151.<sup>34</sup>

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27. Act of June 15, 1935, ch. 260, § 2, 49 Stat. 378.

28. Act of Jan. 12, 1983, 96 Stat. 2515 (codified at 25 U.S.C. § 2202 (2018)).

29. See MCCOY, *supra* note 8, at 453–454.

30. See Larry E. Scrivner, *Acquiring Land Into Trust for Indian Tribes*, 37 NEW ENGLAND L. REV. 603, 604–605 (Spring 2003).

31. Land Acquisitions, 45 Fed. Reg. 62034, 62035 (Sept. 18, 1980) (explaining the need for new Federal land-into-trust regulations as to “enunciate land acquisition policy and to bring uniformity into the application of that policy”).

32. *Id.* at 62034 (originally codified at 25 C.F.R. Part 120a, subsequently redesignated as 25 C.F.R. Part 151).

33. Land Acquisitions (Nongaming), 60 Fed. Reg. 32874 (June 23, 1995) (codified at 25 C.F.R. § 151.11).

34. In 1996, the Department revised the notice requirements of the fee-to-trust regulations to incorporate a 30-day waiting period between a fee-to-trust decision and the actual trust transfer. Land Acquisitions, 61 Fed. Reg. 18082 (Apr. 24, 1996). A 2013 rule eliminated the waiting period and made changes to the notice requirements. Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67928 (Nov. 13, 2013). In addition, in 2001, the Department formally revised the fee-to-trust regulations. See BIA, Acquisition of Title to Land in Trust, 66 Fed. Reg. 3452 (Jan. 16, 2001). The Department, however, subsequently rescinded these revised regulations, leaving the 1995 regulations in place. Acquisition of Title to Land in Trust, 66 Fed. Reg. 56608 (Nov. 9, 2001). The Department later made other

The fee-to-trust regulations include several requirements for tribes and individual Indians seeking trust land.<sup>35</sup> Additional information concerning Departmental land acquisition procedures may be found in the Bureau of Indian Affairs' ("BIA") fee-to-trust handbook, which includes a detailed 16-step process for trust acquisitions.<sup>36</sup> The fee-to-trust process, which begins with the submission of an application, often takes years.

As a threshold matter, tribal applicants must be federally recognized tribes.<sup>37</sup> Regardless of whether the application involves on-reservation or off-reservation land,<sup>38</sup> the applicant must submit, and the Department must consider, information concerning:

- The existence of statutory authority for the acquisition;
- The need of the tribe for additional land;
- The purpose for which the land will be used;
- The impact on the state and its political subdivisions resulting from removal of the tract from tax rolls;
- Jurisdictional problems and potential conflicts of land use;
- Whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and

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regulatory changes to eliminate a provision excluding land in Alaska from the regulations, Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76888 (Dec. 23, 2014), and to revise title evidence requirements for land acquisitions. Title Evidence for Trust Land Acquisitions, 81 Fed. Reg. 30173 (May 16, 2016).

35. Given this Article's focus on the impact of *Carcieri* on tribal, as opposed to individual Indian, land acquisitions, only the Part 151 provisions pertaining to tribal requests will be discussed.

36. See *Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook)*, Version IV (rev. 1), BIA, DEP'T OF INTERIOR (issued June 28, 2016), [https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition\\_of\\_Title\\_to\\_Land\\_Held\\_in\\_Fee\\_or\\_Restricted\\_Fee\\_Status\\_50\\_OI\\_MT.pdf](https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OI_MT.pdf) [hereinafter *Fee-to-Trust Handbook*].

37. 25 C.F.R. § 151.2(b) (2017). The regulations do not require a tribe to demonstrate that it was under federal jurisdiction in 1934.

38. Applications are considered "on-reservation" when the subject land is within or contiguous to the reservation. 25 C.F.R. § 151.10 (2017). Additionally, "reservation" is defined as the "area of land over which the tribe is recognized by the United States as having governmental jurisdiction," as well as former reservations in the State of Oklahoma or where there has been a final judicial determination of diminishment or disestablishment. 25 C.F.R. § 151.2(f).

- Compliance with the National Environmental Policy Act (“NEPA”) and the Departmental procedures on hazardous substance determinations.<sup>39</sup>

When an application is for an off-reservation tract of land, the Department must also consider:

- The tribe’s business plan, if the land is to be acquired for a business purpose; and
- The distance between the tract and the tribe’s reservation. As the distance increases, the Secretary must give greater scrutiny to the tribe’s justification of anticipated benefits and greater weight to the concerns raised by the state and local government.<sup>40</sup>

Both on- and off-reservation applications require the Department to notify state and local governments of the potential acquisition and provide a 30-day window to comment on the potential impacts to regulatory jurisdiction, real property taxes, and special assessments.<sup>41</sup> The regulations require the Department to consider the impacts of the trust acquisition on state and local governments, but do not give such governments a veto power over a proposed acquisition. The Supreme Court has described this process as “sensitive to the complex inter-jurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory.”<sup>42</sup>

Following consideration of these regulatory factors, and compliance with NEPA and Departmental procedures on hazardous substance determinations, the Secretary of the Interior issues a written

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39. See 25 C.F.R. § 151.10(a)–(c), (e)–(h).

40. See 25 C.F.R. § 151.11.

41. See 25 C.F.R. § 151.10. The state and local government notice requirement only applies to discretionary acquisitions and is not invoked when an acquisition is mandated by legislation. *Id.*

42. *City of Sherrill*, 544 U.S. at 220-21. Federal courts have only required Interior to consider, but not resolve, concerns raised by state and local governments. See, e.g., *City of Lincoln City v. U.S. Dep’t of Interior*, 229 F. Supp. 2d 1109, 1125 (D. Or. 2001) (“the regulations require BIA to ‘consider’ [potential tax impacts] but the regulations do not require the Tribe to agree to reimburse the City for revenues that might be lost due to a fee-to-trust transfer, and do not require the BIA to deny the application . . . merely because a potential impact exists”).

decision either approving or denying the application.<sup>43</sup> This decision-making authority is typically delegated to either the Assistant Secretary of Indian Affairs (“AS-IA”) or a BIA official, which then determines the appropriate title transfer and appeal procedures.<sup>44</sup> AS-IA decisions result in the immediate transfer of title into trust.<sup>45</sup> Additionally, AS-IA decisions constitute final agency action subject to immediate judicial review under the Administrative Procedure Act (“APA”).<sup>46</sup> In contrast, BIA decisions are subject to administrative review procedures and title transfer does not occur until either the expiration of the 30-day window for filing a notice of appeal or upon exhaustion of administrative remedies.<sup>47</sup> As a matter of current policy, AS-IA makes gaming and off-reservation decisions, whereas BIA issues decisions on non-gaming, on-reservation fee-to-trust acquisitions.<sup>48</sup>

While Congress occasionally enacts special legislation to accept land into trust on a tribe-by-tribe basis, the Part 151 fee-to-trust process has become the primary mechanism by which tribes can build their land

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43. 25 C.F.R. § 151.12.

44. The identity of the decisionmaker also determines notice procedures. When the decisionmaker is the AS-IA, notice of the decision is provided to the applicant and, if the decision is an approval, published in the Federal Register. 25 C.F.R. § 151.12(c) (2017). When the decisionmaker is a BIA official, notice of the decision is provided to the applicant and, if the decision is an approval, notice is provided to the state and local government, interested parties, and published in a local newspaper of general circulation. 25 C.F.R. § 151.12(d).

45. Title transfer is contingent on the satisfactory completion of title review procedures under 25 C.F.R. § 151.13; *see* 25 C.F.R. § 151.12(c)(2)(iii).

46. 25 C.F.R. § 151.12(c). Challenges to final Interior decisions to acquire land in trust are “garden-variety APA claim[s].” *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 217 (2012). Courts have upheld Interior’s broad discretion to decide whether lands should be acquired in trust. *See, e.g., South Dakota v. U.S. Dep’t of Interior*, 314 F. Supp. 2d 935, 943 (D.S.D. 2004), *aff’d*, 423 F.3d 790, 801 (8th Cir. 2005).

47. 25 C.F.R. § 151.12(d). Additionally, title transfer is contingent on the satisfactory completion of title review procedures under 25 § 151.13; *see* 25 C.F.R. § 151.12(d)(2)(iv).

48. *Off-Reservation Fee-to-Trust Decisions*, Mem. No. NPM-TRUS-36, DEP’T OF INTERIOR, ASSISTANT SEC’Y INDIAN AFFAIRS (May 31, 2018); *Fee-to-Trust Handbook*, *supra* note 36, at 24.

base and, simultaneously, strengthen their tribal governments and economies.<sup>49</sup>

We close this section by noting that the significance of trust land acquisition—and the land-into-trust process—to tribes cannot be overstated. Interior has described taking land into trust as “one of the most important functions Interior undertakes on behalf of the tribes. Acquisition of land in trust is essential to tribal self-determination.”<sup>50</sup> As noted previously, tribes exercise jurisdiction over trust lands, and state and local jurisdiction is limited.<sup>51</sup> Trust status also qualifies land for certain federal programs and services, and provides “enhanced opportunities for housing, energy development, negotiated rights-of-way and leases, as well as greater protections for subsistence hunting and agriculture.”<sup>52</sup> And yet today, the United States only holds approximately 57 million acres of land in trust,<sup>53</sup> “a restoration of less than 10% of the lands lost in less than 50 years under the allotment policy.”<sup>54</sup> Thus, there is much work left to do.

### III. THE SUPREME COURT’S 2009 *CARCIERI* DECISION

The long-established fee-to-trust process dramatically changed in 2009 with the Supreme Court’s watershed decision in *Carcieri v. Salazar*.<sup>55</sup> The case started as a dispute between the Narragansett Indian Tribe (“Narragansett” or “Narragansett Tribe”), the State of Rhode Island,

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49. See MCCOY, *supra* note 8, at 445 (explaining that while, historically, tribal land bases were created or protected via congressional or executive action, the Part 151 process is “presently the primary method of placing land into trust [and] is critical to Indians and tribes because it is the principal mechanism for rebuilding the Indian land base.”).

50. BIA, *Fee-to-Trust*, DEP’T OF INTERIOR, <https://www.bia.gov/bia/ots/fee-to-trust>.

51. See *supra* note 23.

52. *Fee-to-Trust*, *supra* note 50.

53. BIA, *Programs & Services*, DEP’T OF INTERIOR, <https://www.bia.gov/programs-services>.

54. *The Lack of Adequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934: Hearing Before the H. Subcomm. On Indian, Insular and Alaska Native Affairs of the H. Comm. on Nat. Resources*, 114th Cong. 1 (May 14, 2015) [hereinafter *Lack of Adequate Standards Hearing*] (statement of Kevin K. Washburn, Assistant Sec’y for Indian Affairs).

55. 555 U.S. 379.

and a local government over land use regulation.<sup>56</sup> The Narragansett Tribe once occupied much of present-day Rhode Island, but, over time, lost its land base in transactions with the State and through the State's policy of "detrribalization."<sup>57</sup> The Narragansett Tribe brought suit against the State and others in the 1970s to reclaim its ancestral land,<sup>58</sup> arguing the conveyances to the State violated the Indian Non-Intercourse Act.<sup>59</sup> Congress ultimately settled the Narragansett Tribe's lawsuit through the Rhode Island Indian Claims Settlement Act of 1978.<sup>60</sup> In exchange for relinquishing its land claims, the Narragansett Tribe received title to approximately 1,800 acres of land in the Town of Charlestown, Rhode Island,<sup>61</sup> a small portion of its original land base. Interior formally

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56. *Id.* at 385. The facts behind, and holding of, *Carcieri* have been the subject of numerous articles, Congressional hearings, and Interior opinions, and thus we only provide a brief summary here. *See, e.g.,* Heidi McNeil Staudenmaier & Ruth K. Khalsa, *A Post-Carcieri Vocabulary Exercise: What If 'Now' Really Means 'Then?'* 1 UNLV GAMING L. J., 39 (2010); Sarah Washburn, *Distinguishing Carcieri v. Salazar: Why the Supreme Court Got it Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA's Trust-Land Provisions*, 85 WASHINGTON L. REV. 603 (2010); *Supreme Court Decision, Carcieri v. Salazar, Ramifications to Indian Tribes: Oversight Hearing before the H. Comm. on Nat. Resources*, 111th Cong. (April 1, 2009) [hereinafter April 1, 2009 *Carcieri* Oversight Hearing]; *Hearing to Examine Executive Branch Authority to Acquire Trust Lands for Indian Tribes: Oversight Hearing before the S. Comm. on Indian Affairs*, 111th Cong. (May 21, 2009) [hereinafter May 21, 2009 *Carcieri* Oversight Hearing]; M. Maureen Murphy, *Carcieri v. Salazar: The Secretary of the Interior May Not Acquire Trust Land for the Narragansett Indian Tribe Under 25 U.S.C. Section 465 Because that Statute Applies to Tribes "Under Federal Jurisdiction" in 1934*, Congressional Research Service RL34521, (Aug. 23, 2016) (on file with Pub. Land & Resources L. Rev.); The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, Sol. Op. M-37029 (U.S. Dep't of Interior Mar. 12, 2014) [hereinafter *Carcieri* M-Opinion or M-37029], <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.

57. *Carcieri*, 555 U.S. at 383.

58. *Id.* at 384.

59. 25 U.S.C. § 177 (1834). The Non-Intercourse Act prohibits the conveyance of tribal land without federal approval.

60. Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978).

61. *Id.* § 8; *Carcieri*, 555 U.S. at 384. Unlike other trust land, the Act provided that the 1800 acres would be "subject to civil and criminal laws and jurisdiction of the State of Rhode Island." 92 Stat. at § 8(a).



acknowledged the Narragansett Tribe through the Part 83 process in 1983,<sup>62</sup> and accepted the 1,800 acres of land in trust in 1988.<sup>63</sup>

Shortly thereafter, the Narragansett Tribe's housing authority used funds from the Department of Housing and Urban Development ("HUD") to purchase 31 acres of land adjacent to the settlement lands from private developers for the purpose of providing low-income housing to tribal members.<sup>64</sup> The housing authority then conveyed the land to the Narragansett.<sup>65</sup> The State and Town of Charlestown sought an injunction to prevent the Narragansett Tribe from constructing housing on the parcel without obtaining permits and approvals under state and local law.<sup>66</sup> In 1997, the Narragansett Tribe requested that the BIA acquire the parcel in trust pursuant to Section 5 of the IRA to resolve questions about land use regulation and to ensure it could develop much-needed housing for its members.<sup>67</sup> On March 6, 1998, despite objections from the Governor of Rhode Island and the Town, the BIA decided to acquire the land in trust on behalf of Narragansett.<sup>68</sup>

The Governor and the Town appealed the BIA's decision to the Interior Board of Indian Appeals ("IBIA"),<sup>69</sup> which affirmed the BIA's land-into-trust decision.<sup>70</sup> The Governor and Town then challenged the fee-to-trust decision in federal district court, arguing, among other things, that the Secretary's authority to acquire land in trust for Indian tribes under the first definition of "Indian" in the IRA was limited to tribes who were

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62. Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 10, 1983).

63. *Carcieri*, 555 U.S. at 384–85.

64. *Town of Charlestown, Rhode Island v. Eastern Area Director*, 35 I.B.I.A. 93, 95 (2000).

65. *Id.*

66. *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 911–12 (1st Cir. 1996).

67. *Carcieri*, 555 U.S. at 385; *Town of Charlestown*, 35 I.B.I.A. at 95.

68. *Town of Charlestown*, 35 I.B.I.A. at 95.

69. The IBIA is "an appellate review body that exercises the delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior in appeals involving Indian matters." *About the Interior Board of Indian Appeals*, U.S. DEP'T OF INTERIOR, <https://www.doi.gov/oha/organization/ibia>. BIA Regional Director (formerly Area Director) decisions to take land into trust may be appealed to the IBIA pursuant to 25 C.F.R. Part 2, and are stayed pending resolution of any administrative appeal. 25 C.F.R. § 2.6(a) (2017).

70. *Town of Charlestown*, 35 I.B.I.A. at 94.

federally recognized in 1934, which was the date of the IRA's enactment.<sup>71</sup> According to the Governor and Town, the Narragansett Tribe could not meet the IRA's first definition of "Indian" because Narragansett was not federally recognized until 1983 and was thus ineligible to have land placed into trust on its behalf. The district court rejected this argument, holding that "as a federally-recognized tribe which existed at the time of the enactment of the IRA," as shown through its acknowledgment, Narragansett was eligible to have land acquired in trust on its behalf.<sup>72</sup>

The Court of Appeals for the First Circuit, sitting en banc, affirmed, but under a different rationale than the district court.<sup>73</sup> The court concluded the term "now" in the first definition of Indian in the IRA, "members of any recognized Indian tribe now under Federal jurisdiction," was ambiguous. The court reasoned that "now" could operate "at the moment Congress enacted [the IRA] or at the moment the Secretary invokes it."<sup>74</sup> Applying *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>75</sup> the Court deferred to the Secretary's "reasonable" interpretation of the statute, which authorized trust acquisitions for tribes that were under federal jurisdiction and federally recognized at the time of the trust application.<sup>76</sup>

The Supreme Court granted the Governor, State, and Town's petitions for certiorari.<sup>77</sup> Petitioners argued the IRA limits the Secretary's authority to tribes who were both federally recognized and under federal

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71. *Carcieri v. Norton*, 290 F. Supp. 2d 167, 178-179 (D.R.I. 2003).

72. *Id.* at 180-81.

73. *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2008). Prior to the decision, a panel of the First Circuit, in a decision that was later withdrawn, also upheld the trust acquisition. *Carcieri v. Norton*, 398 F.3d 22 (1st Cir. 2005). On rehearing, the panel held that the Secretary was authorized to acquire land in trust for Narragansett, regardless of its status in 1934, and to hold otherwise "would diminish the Tribe's privileges in relation to other federally recognized tribes," contrary to 25 U.S.C. § 476(f) (now § 5123(f)). *Carcieri v. Norton*, 423 F.3d 45 (1st Cir. 2005), *rehearing en banc granted, opinion withdrawn, withdrawn from West Reporter publication*.

74. *Carcieri*, 497 F.3d at 26.

75. 467 U.S. 837, 843 (1984). In *Chevron*, the Supreme Court held that, where statutory language is ambiguous, a court should defer to the agency's reasonable interpretation of the language in question and not substitute its own construction. *Id.*

76. *Carcieri*, 497 F.3d at 30-31.

77. *Carcieri v. Kempthorne*, 552 U.S. 1229 (2008).

jurisdiction in 1934.<sup>78</sup> Twenty-one states filed a brief in support of the Governor and Town, complaining “the trust power has the capacity to change the character of an entire state.”<sup>79</sup> The United States, supported by amicus briefs filed by Narragansett, two other tribes, the National Congress of American Indians, law professors, and historians, argued the IRA authorized the acquisition of land in trust for “tribes” and “Indians,” and the definition of “Indian” did not limit the definition of “tribe.”<sup>80</sup> Even if it did, the United States argued that “now” did not unambiguously mean the date of the IRA’s enactment, and that ambiguity left a gap for the agency to fill.<sup>81</sup>

The Supreme Court reversed the First Circuit.<sup>82</sup> In a majority opinion by Justice Thomas, the Court held the term “now” in “members of any recognized Indian tribe *now* under Federal jurisdiction” was “unambiguous,” and referred to the time of the IRA’s enactment in 1934.<sup>83</sup> Justice Thomas relied on the “ordinary meaning” of the word “now,” the “natural reading” of the word “now” in context, and references to “now or hereafter” in other parts of the IRA, which, in Justice Thomas’s opinion, demonstrated Congress intended to limit the word “now” to “events contemporaneous with the Act’s enactment.”<sup>84</sup> Although insisting it was not necessary for his holding, Justice Thomas noted that shortly following

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78. Brief for Petitioner Donald L. Carcieri at 13, *Id.* (No. 07-526); Brief for Petitioner State of Rhode Island at 21, *Id.*; Brief of Petitioner Town of Charlestown, Rhode Island at 25, *Id.*

79. Brief of the States of Alabama et al. as *Amicus Curiae* in Support of the Petitioners, *Id.* These states included Alabama, Connecticut, Alaska, Arkansas, Florida, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, and Utah.

80. Brief for the Respondents at 12, *Id.* See also Briefs of the National Congress of American Indians, the Narragansett Indian Tribe, Law Professors Specializing in Federal Indian Law, Historians Frederick E. Hoxie, Paul C. Rosier, and Christian W. McMillen, and Standing Rock Sioux Tribe and Nottawaseppi Huron Band of the Potawatomi in Support of Respondents, *Id.*

81. Brief for the Respondents at 10, *Id.*

82. *Carcieri*, 555 U.S. at 387.

83. *Id.* at 390–91. Justices Roberts, Scalia, Kennedy, Breyer, and Alito joined Justice Thomas’s opinion. Justice Breyer filed a concurring opinion. Justice Souter filed an opinion concurring in part and dissenting in part, in which Justice Ginsburg joined. Justice Stevens filed a dissenting opinion.

84. *Id.* at 388–90.

the IRA's enactment, then Commissioner of Indian Affairs, John Collier, sent a letter in which he interpreted the first definition as applying to a recognized tribe "that was under Federal jurisdiction at the date of the Act."<sup>85</sup> Justice Thomas concluded the Secretary's authority to acquire land in trust for tribes under the first definition of "Indian" is limited to tribes under federal jurisdiction in 1934, when the IRA was enacted.<sup>86</sup> Critically, he did not define "under federal jurisdiction." Because none of the parties argued Narragansett was under federal jurisdiction in 1934, however, and the Secretary failed to challenge the Governor and Town's assertion that the Narragansett Tribe was *not* under federal jurisdiction in 1934, Justice Thomas concluded the Secretary did not have authority to take the 31-acre parcel into trust for the Tribe.<sup>87</sup>

Numerous commentators have, correctly in our view, challenged Justice Thomas's myopic and oversimplified analysis of the IRA, concluding the Court got it wrong.<sup>88</sup> In addition, in a scathing report, the Senate Committee on Indian Affairs faulted the United States for failing to argue Narragansett was under federal jurisdiction in 1934 and to file key documents with the Court, describing it as a "breach of the Federal government's trust responsibility."<sup>89</sup> However, it is not the intent of this article to re-litigate *Carcieri*, but rather to address its aftermath and to recommend a path forward. To do so, it is necessary to also consider the concurring opinions of Justices Breyer and Souter.

Justice Breyer filed a concurring opinion setting forth several qualifications to his joining of the majority opinion.<sup>90</sup> The last of these qualifications, in which he posited that the majority's interpretation of "now" as meaning 1934 "may prove somewhat less restrictive than it at

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85. *Id.* at 390.

86. *Id.* at 382.

87. *Id.* at 382-383, 395-396.

88. *See, e.g.,* Staudenmaier & Khalsa, *supra* note 56; Melanie Riccobene Jarboe, *Collective Rights to Indigenous Land in Carcieri v. Salazar*, 30 B.C. THIRD WORLD L.J. 395 (Spring 2010); Washburn, *supra* note 56.

89. AMENDING THE ACT OF JUNE 18, 1934, TO REAFFIRM THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO TAKE LAND INTO TRUST FOR INDIAN TRIBES, S. REP. NO. 112-166, at 18 (May 17, 2012).

90. *Carcieri*, 555 U.S. at 396 (Breyer, J., concurring).

first appears,”<sup>91</sup> has been the subject of analysis and debate.<sup>92</sup> To demonstrate potential flexibilities, Justice Breyer made three key points. First, he reasoned a “tribe may have been ‘under Federal jurisdiction’ in 1934 even though the Federal Government did not believe so at the time,” citing examples of tribes the Department erroneously believed had dissolved or otherwise ceased to exist at one point but then later recognized.<sup>93</sup> Second, he explained the first definition “imposes no time limit upon recognition,” in other words, “now” only modifies “under federal jurisdiction” and not “recognized.”<sup>94</sup> Justice Breyer noted that a tribe could have been under federal jurisdiction in 1934, despite not being formally recognized until later, and that, in fact, “later recognition reflects earlier ‘Federal jurisdiction.’”<sup>95</sup> Finally, Justice Breyer identified some types of evidence that, in his view, demonstrated a tribe was under federal jurisdiction, including: (1) a treaty relationship; (2) congressional appropriations; or (3) enrollment with the Indian Office.<sup>96</sup>

Justice Souter, joined by Justice Ginsburg, also agreed with the majority that “now” meant 1934, and agreed with Justice Breyer’s three qualifications.<sup>97</sup> Justice Souter added that “[n]othing in the majority opinion forecloses the possibility that the two concepts [of] recognition and jurisdiction, may be given separate content.”<sup>98</sup> However, Justice Souter dissented in part on the basis that he would have remanded the case

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91. *Id.* at 397 (Breyer, J., concurring). The other two qualifications were that: (1) Justice Breyer did not believe the statutory language itself was determinative, but did not afford the Department deference because of Collier’s 1936 letter and his view that the legislative history shows that Congress did not intend to delegate interpretive authority to the Department such that *Chevron* deference would apply; and (2) his view that the legislative history also shows that “now” means “in 1934.” *Id.* at 396-97 (Breyer, J., concurring).

92. *See* M-37029, *supra* note 56 (relying heavily on Justice Breyer’s concurring opinion); Petition for a Writ of Certiorari, *Citizens Against Reservation Shopping v. Jewell*, *Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017)(No. 16-572) (faulting the Solicitor’s reliance on Breyer’s concurring opinion).

93. *Carcieri*, 555 U.S. at 398–399 (Breyer, J., concurring).

94. *Id.* at 398 (Breyer, J., concurring).

95. *Id.* at 398–399 (Breyer, J., concurring).

96. *Id.* at 399 (Breyer, J., concurring).

97. *Id.* at 400 (Souter J., concurring in part and dissenting in part).

98. *Id.*

for the Department to consider whether the Tribe was under federal jurisdiction in 1934.<sup>99</sup>

Two other points regarding the *Carcieri* opinion bear mentioning. First, the majority opinion acknowledged the required demonstration of federal jurisdiction in 1934 under the first definition of “Indian” does not limit the Secretary’s authority to acquire land in trust under other statutory provisions.<sup>100</sup> In that way, the Court left the door open for tribes qualifying under other definitions of Indian in the IRA, or other statutes, such as tribe-specific restoration acts.<sup>101</sup> As discussed in Section III(b)(iii) below, Interior has seized upon this language to support trust acquisition for tribes and to limit the holding of *Carcieri*. Second, the 31 acres at issue in *Carcieri* remain in fee to this day. The houses constructed with HUD funding have never been completed or used,<sup>102</sup> providing just one example of the devastating impact that *Carcieri* has had on tribes.

#### IV. RESPONSES TO *CARCIERI*

Indian country immediately responded to the *Carcieri* decision with substantial concern and then swift action. Indian law and policy experts criticized the Court’s cribbed reading of the IRA, as well as its antagonism to tribal interests.<sup>103</sup> Although many identified the looming

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99. *Id.* at 401 (Souter, J. concurring in part and dissenting in part). Justice Stevens issued a dissenting opinion, sharply criticizing the majority’s “cramped” reading of a broad statute. *Id.* at 413 (Stevens, J., dissenting). He argued that the Secretary had authority to acquire land in trust for “Indians,” which refers to both tribes and individuals. *Id.* at 410 (Stevens, J., dissenting). Only individuals are required to demonstrate that they were under federal jurisdiction in 1934. *Id.* at 413 (Stevens, J., dissenting). Tribes, in Justice Stevens’ view, only had to demonstrate that they are recognized, and, as a federally recognized tribe, the Narragansett Tribe was therefore eligible to have land acquired in trust on its behalf. *Id.* at 411, 413 (Stevens, J., dissenting).

100. *Id.* at 392.

101. *See* § III(b)(iii) *infra*.

102. Mem. from Joe Webster and Jerry Straus, Hobbs Straus Dean & Walker, to Tribal Clients, *SCIA Roundtable Discussion re Carcieri-fix legislation* 4 (Apr. 1, 2015), [http://www.usetinc.org/wp-content/uploads/LizMalerba/WWS%20LnP/4\\_3\\_15/Report%20on%20Carcieri%20Roundtable%204%201%2015.pdf](http://www.usetinc.org/wp-content/uploads/LizMalerba/WWS%20LnP/4_3_15/Report%20on%20Carcieri%20Roundtable%204%201%2015.pdf).

103. *See, e.g.,* Matthew L.M. Fletcher, *Decision’s in. “Now” begins work to fix Carcieri*, INDIAN COUNTRY TODAY (Feb. 25, 2009),

unknowns concerning the scope and meaning of “under Federal jurisdiction,” it was generally recognized the decision would, or should, not impact tribes with a longstanding, uninterrupted relationship with the federal government.<sup>104</sup> Nonetheless, many feared that *Carcieri*-related litigation would greatly increase the time and cost of acquiring tribal trust lands, particularly for those tribes who had more recently obtained federal recognition through the Departmental acknowledgement process.<sup>105</sup> Indian law scholar Matthew Fletcher accurately forecast that *Carcieri* lawsuits may “forc[e] some tribes to undergo the strange and humiliating process of earning a kind of federal recognition all over again.”<sup>106</sup>

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<https://web.archive.org/web/20100108084036/http://www.indiancountrytoday.com/home/content/40290987.html#close>; Bryan Newland, *Initial Reaction to Carcieri Opinion*, TURTLE TALK (blog for Michigan State University College of Law, Indigenous Law & Policy Center) (Feb. 24, 2009), <https://turtletalk.wordpress.com/2009/02/24/initial-reaction-to-carcieri-opinion/>. For a general discussion of the Supreme Court’s record in Indian law cases over the last 30 years, see Alexander Tallchief Skibine, *University of Utah College of Law Research Paper No. 230* (2017) (concluding that “the Court has had difficulties upholding the federal policy of respecting tribal sovereignty and encouraging tribal self-government”).

104. G. William Rice, *The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri “Fix”: Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 594 (2009) (“This decision will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or OIWA and changed its name or organizational structure since 1934.”); see also Fletcher, *supra* note 103; Newland, *supra* note 103. It was also widely assumed that past tribal trust land acquisitions would be insulated from *Carcieri* challenges on the basis of the Quiet Title Act’s Indian lands exception. Yet that assumption was put to bed by the Supreme Court’s 2012 *Patchak* decision, holding that the Quiet Title Act does not bar APA challenges to fee-to-trust decision once land is acquired in trust as long as the challenge is brought by plaintiffs not seeking to quiet title in themselves. See *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 217 (2012).

105. Newland, *supra* note 103 (noting that *Carcieri* would affect tribes not acknowledged until after 1934, “plac[ing] yet another litigation obstacle in front of tribes as they seek to have land placed into trust”); Fletcher, *supra* note 103 (noting that “Indian tribes in the twilight of the concurring opinions may be engaged in expensive litigation to prove that they were ‘under federal jurisdiction’ in 1934” and that such litigation “may require the heavy expenditure of funds for expert witnesses”); see also Rice, *supra* note 104 at 594.

106. Fletcher, *supra* note 103.

Prompted by these concerns, tribal leaders and pan-tribal organizations led the rallying cry at the doors of Congress and the Department, seeking a quick and forceful response by their federal trustee, as detailed below.

#### A. *Proposed Legislative Solutions*

Spurred by tribes, Congress sprang into action by holding hearings and considering legislation to address *Carcieri*. Since the *Carcieri* decision in February 2009, Congress has introduced 15 clean *Carcieri* fixes to provide that Interior has authority to acquire land in trust for all tribes, without imposing other restrictions on the fee-to-trust process. Several bills to ratify prior acquisitions have also been introduced, as well as a bill to fix *Carcieri* but also requiring drastic changes to the fee-to-trust process. Yet, with the exception of one tribe-specific bill, ten years later Congress has failed to enact legislation remedying *Carcieri*'s consequences. And such universal legislation seems unlikely, despite the fact it remains desperately needed. As we explain below, what started with the seemingly simple proposition that every federally recognized tribe should be eligible to put land in trust under the IRA has evolved into a much larger, at times ugly, debate about gaming and economic development, state and local government authority, tribal sovereignty, the legitimacy of certain tribes, and the fee-to-trust process as a whole. The controversy over *Carcieri* has even led one reporter to characterize it as “[t]he new Indian wars in Washington.”<sup>107</sup> The entrenched battle lines have led to congressional paralysis, which is unlikely to change anytime soon. While many tribes and tribal organizations want a clean *Carcieri* fix, states and local governments, as well as citizens’ groups and some members of Congress insist on broader changes to the fee-to-trust process that most tribes do not want to see effectuated.

##### 1. *Initial Congressional Response*

Less than two months after the *Carcieri* decision, in April 2009, the House Natural Resources Committee held an oversight committee hearing on the decision’s ramifications for Indian tribes.<sup>108</sup> Committee

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107. David Rogers, *The New Indian wars in Washington*, POLITICO (Oct. 30, 2015), <https://www.politico.com/story/2015/10/new-indian-wars-washington-215208>.

108. April 1, 2009 *Carcieri* Oversight Hearing, *supra* note 56.



members and panelists expressed significant concerns about both the Court's reasoning in *Carcieri* and its implications. These implications included: frivolous litigation challenging whether a tribe was under federal jurisdiction in 1934; different classes of and false distinctions between tribes, contrary to 25 U.S.C. § 5123(f) and (g);<sup>109</sup> questions about whether Interior could take land into trust for recently recognized tribes; barriers to economic development; confusion about and delays in the land-into-trust process; and questions about criminal jurisdiction.<sup>110</sup> The overwhelming consensus was that Congress must act to address *Carcieri*.<sup>111</sup> Only one panelist at the House hearing, Alaska attorney Don Mitchell, defended the Supreme Court's decision as correctly decided.<sup>112</sup>

The next month, the Senate Committee on Indian Affairs also held an oversight hearing to discuss *Carcieri*.<sup>113</sup> Committee members and

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109. 25 U.S.C. § 5123(f) and (g), described as the "privileges and immunities" clause of the IRA, prohibits Interior from making distinctions between federally-recognized tribes.

110. April 1, 2009 *Carcieri* Oversight Hearing, *supra* note 56, at 2 (statement of the Honorable Nick J. Rahall, Chairman, Comm. on Nat. Resources) (discussing frivolous litigation); *id.* at 6–7 (statement of Colette Routel, Visiting Assistant Professor, Univ. of Mich. Law Sch.) (arguing that the decision creates two classes of tribes, "the haves and the have nots," and noting that Interior would not be able to acquire land in trust for recently recognized tribes without legislation); *id.* at 16 (statement of Michael J. Anderson, Partner, Anderson Tuell, LLP) (discussing future delays and confusion about the land-into-trust process and noting *Carcieri* will hinder economic development); *id.* at 31 (response of Michael J. Anderson to question from Chairman Rahall) (noting possible challenges to criminal jurisdiction). Portending litigation and turmoil at the Department of the Interior for years to come, attorney Michael Anderson testified:

Regrettably, some attorneys and their clients may see the *Carcieri* decision as a springboard to revisit assimilationist and antisovereignty positions best left in the termination era. Facing such litigation or, possibly, after an erroneous decision by lower courts, the Department of the Interior could be compelled to examine the historical record for individual tribes. My experience at the Department has shown that gaps in historic records, staffing shortages, restrictive interpretations, and well-funded opponents could delay land-into-trust acquisitions for years.

*Id.* at 14.

111. See generally *id.*

112. *Id.* at 24–25 (Statement of Donald Craig Mitchell, Esq.).

113. May 21, 2009 *Carcieri* Oversight Hearing, *supra* note 56.

panelists expressed similar concerns to those raised in the House hearing and argued that Congress must act quickly to fix *Carcieri*.<sup>114</sup> The National Congress of American Indians (“NCAI”) proposed a clean *Carcieri* fix—legislative language to remove the words “now under federal jurisdiction” from the first definition of “Indian.”<sup>115</sup> However, the Attorney General of the State of South Dakota, on behalf of the Conference of Western Attorneys General, argued that Congress should use the *Carcieri* decision to revisit the entire land-into-trust process.<sup>116</sup> Mirroring attacks on the fee-to-trust process raised by states in the *Carcieri* litigation, he argued trust acquisitions inhibit economic development and the process was unfair to, and biased against, state and local governments.<sup>117</sup> In addition to testimony provided at the hearing, numerous state and local officials, tribes, and attorneys, among others, provided written statements to the committee, demonstrating the importance of, and controversy surrounding, trust land acquisitions.<sup>118</sup>

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114. *Id.*

115. *Id.* at 19 (prepared Statement of Hon. Ron Allen, Sec’y, NCAI). Attorney Edward Lazarus also argued that any administrative approach include a brightline rule that any tribe that went through the federal acknowledgment process had already established that it was under federal jurisdiction in 1934, based on a finding that it had been “identified as an American Indian entity on a substantially continuous basis since 1900.” *Id.* at 5 (statement of Edward P. Lazarus, Partner, Akin, Gump, Strauss, Hauer, and Feld, LLP.)

116. *Id.* at 21 (prepared Statement of Lawrence E. Long, Att’y Gen., S. D., Chairman, Conference of Western Att’y Gen.).

117. *Id.* at 22, 25.

118. *Id.* at 33–180. Submissions ranged from complaints that tribes improperly seek to circumvent state law through trust land acquisition, *id.* at 33 (prepared statement of Robb and Ross Law Firm, on behalf of Artichoke Joe’s); complaints about the negative impacts of trust acquisitions on state and local government, *id.* at 46 (prepared statement of Hon. Richard Blumenthal, Att’y Gen., Connecticut), *id.* at 54 (prepared statement of Mike McGowan, Chairman, CSAC Housing, Land Use, and Transp. Comm. and Indian Gaming Working Grp.), *id.* at 135 (Communication from the Chief Legal Offices of the Following States and Territories: Alaska, Colorado, Connecticut, Florida, Hawaii, Iowa, Kansas, Massachusetts, Michigan, Mississippi, Ohio, Rhode Island, South Carolina, Tennessee, Texas, and Utah to Senator Dorgan *et al*); frustration that the current fee-to-trust process “does not provide for meaningful analysis of weighing of the input of states and local units of governments and is void of binding limits on the discretion of the secretary,” *id.* at 135 (communication from the Chief Legal Offices of the Following States and Territories: Alaska, Colorado, Connecticut, Florida, Hawaii, Iowa, Kansas,

In addition to holding oversight hearings, members of Congress also introduced legislation to fix *Carcieri*. In September 2009, Senator Byron Dorgan introduced a bill in the Senate to revise the first definition of “Indian” to include “any federally recognized Indian tribe.”<sup>119</sup> In this way, the bill would have removed the Supreme Court’s requirement that a tribe demonstrate it was “under federal jurisdiction” in 1934, and the Secretary would have authority to acquire land in trust for all federally recognized tribes, as determined at the time of the trust application. The bill applied retroactively to the date of the IRA.<sup>120</sup>

The bill was referred to the Senate Committee on Indian Affairs, and following several amendments, was reported favorably out of committee through a business meeting.<sup>121</sup> The full Senate never voted on the bill.

Meanwhile, the House of Representatives introduced two bills to reaffirm the Secretary’s authority to acquire land in trust for all Indian tribes. The bills, introduced by Representatives Tom Cole and Dale Kildee, were identical.<sup>122</sup> Like Senator Dorgan’s bill, they would have replaced “any recognized Indian tribe now under jurisdiction” in the IRA’s first definition of “Indian” with “any federally recognized Indian tribe.”<sup>123</sup>

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Massachusetts, Michigan, Mississippi, Ohio, Rhode Island, South Carolina, Tennessee, Texas, and Utah to Senator Dorgan *et al.*); discussion of the devastating impacts of the *Carcieri* decision on tribes, *id.* at 47 (prepared Statement of Bruce S. “Two Dogs” Bozsum, Chairman, Mohegan Tribe of Indians of Connecticut), *id.* at 126 (Apr. 13, 2009 Letter from Chairman Janice Mabee to Senator Bryon Dorgan); and challenging the legitimacy of numerous tribes *id.* at 59-61 (prepared statement of Donald Craig Mitchell, Attorney, Anchorage, Alaska) (arguing that, since June 18, 1934, Congress and Interior “have created at least 104 ‘federally recognized tribes’”).

119. S. 1703, 111th Congress § 1(a)(2) (introduced Sept. 24, 2009).

120. *Id.* at § 1(b).

121. S. REP. NO. 111-247, 111th Cong. (2009). The revised bill stated that it did not affect any other federal law or any limitation on the Secretary’s authority under any other federal law or regulation other than the IRA. S. 1703, as amended § 1(c). It also required the Secretary to submit a report to Congress discussing the effects of the *Carcieri* decision within one year of enactment and including a list of each tribe and parcel of land effected by the decision. *Id.* § 1(d).

122. H.R. 3697, 111th Cong. (introduced Oct. 1, 2009); H.R. 3742, 111th Cong. (introduced Oct. 7, 2009).

123. H.R. 3697 § 1(a)(1); H.R. 3742, § 1(a)(1). Unlike the Senate’s bill, however, they also would have replaced the existing definition of “Indian tribe,” “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation” with

The bills' changes to the definition would have operated retroactively, with an effective date of June 18, 1934.<sup>124</sup> In this way, the bills sought to remove any question about the validity of fee-to-trust decisions issued before the *Carcieri* decision.

On November 4, 2009, the House Committee on Natural Resources held a legislative hearing on both bills.<sup>125</sup> Testimony revealed the sharp differences of opinion about land-into-trust. An Interior official, tribal officials, and attorneys spoke about the importance of trust land acquisition for tribes and the need to quickly act to fix *Carcieri*.<sup>126</sup> State and local government officials criticized the land-into-trust process, and demanded a fix that would protect state and local governments.<sup>127</sup> Some members were equally skeptical about a clean *Carcieri* fix—Representative Doc Hastings noted that 27 state Attorneys General voiced concerns about the land into-trust process, and giving the Secretary unconditional authority to acquire land in trust.<sup>128</sup> The committee did not vote on the bills, and they never made it out of committee.

The closest Congress came to enacting a *Carcieri* fix was in late 2010, when the House of Representatives passed a continuing resolution ("CR") for the 2011 fiscal year budget that included a clean *Carcieri* fix.<sup>129</sup> The House affirmed the authority of the Secretary to acquire trust land for all federally recognized tribes.<sup>130</sup> The CR also expressly ratified and confirmed prior fee-to-trust decisions, to the extent there was a challenge based on whether a tribe was recognized or under federal jurisdiction in

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a definition requiring federal acknowledgment. H.R. 3697, § 1(a)(2); H.R. 3742, § 1(a)(2).

124. H.R. 3697, § 1(b); H.R. 3742, § 1(b).

125. *Legislative Hearing on H.R. 3697 and H.R. 3742, to Amend the Act of June 18, 1934, to Reaffirm the Authority of the Secretary of the Interior to Take Land into Trust for Indian Tribes*, 111th Congress (Nov. 4, 2009).

126. *Id.* (statements of: Chairman Bill Iyall, Cowlitz Indian Tribe; Chairman Janice Mabee, Sauk-Suiattle Tribe; Chairwoman Sandra Klineburger, Stillaguamish Tribe of Indians; and Riyaz Kanji, on behalf of the Grand Traverse Band of Ottawa and Chippewa Indians).

127. *Id.* (statements of Steven Woodside, Sonoma Cty. Counsel; Att'y Gen. Richard Blumenthal, Conn.).

128. *Id.* at 3 (statement of the Hon. Doc Hastings).

129. *House Continuing Resolution for 2011 Fiscal Year*; H.R. 3082, 111th Cong. § 2727 (2010).

130. *Id.* § 2727(a).

1934.<sup>131</sup> Finally, like the Senate bill, the CR clarified that it did not affect other statutes.<sup>132</sup> However, the version of the CR with the *Carcieri* fix did not pass the Senate. It remains the only *Carcieri* fix to ever pass in either chamber of Congress.

## 2. 112th and 113th Congresses

In the next Congress, Representatives Dale Kildee and Tom Cole again introduced legislation clarifying the authority of the Department to acquire land in trust for federally recognized tribes.<sup>133</sup> The bills were referred to the House Subcommittee on Indian, Insular, and Alaska Native Affairs, which held a hearing on July 12, 2011.<sup>134</sup> The same battle lines were drawn, with Interior and tribal officials lining up in support of a clean *Carcieri* fix<sup>135</sup> and a local government official and citizens' group representative demanding larger changes to the land-into-trust process.<sup>136</sup> Cheryl Schmidt, the Director of Stand Up For California!, also expressed significant concerns about gaming,<sup>137</sup> despite the fact that only a tiny fraction of trust acquisitions are for gaming purposes.<sup>138</sup> Both bills died in the subcommittee without further action.

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131. *Id.* § 2727(b).

132. *Id.* § 2727(c).

133. H.R. 1234, 112th Cong. § 1(a)(1) (introduced Mar. 29, 2011); H.R. 1291, 112th Cong. §§ 1(a)(b) (introduced Mar. 31, 2011). The Kildee bill also expressly ratified and confirmed prior fee-to-trust decisions, to the extent there was a challenge based on whether a tribe was recognized or under federal jurisdiction in 1934. Cole's bill would have clarified that Section 5 of the IRA would not apply in Alaska.

134. *Legislative Hearing on H.R. 1291, H.R. 1234 and H.R. 1421: House Subcommittee on Indian, Insular, and Alaska Native Affairs*, 112th Cong. (July 12, 2011).

135. *Id.* (statements of Donald "Del" Laverdure, Principal Deputy Assistant Secretary for Indian Affairs; Chairman Earl J. Barbry, Sr, Tunica-Biloxi Tribe of Louisiana; Chairman Cedric Cromwell, Mashpee Wampanoag Tribe).

136. *Id.* (statements of Susan Adams, President, Marin County Board of Supervisors; Cheryl Schmit, Director, Stand Up For California!).

137. *Id.* (statement of Cheryl Schmit, Director, Stand Up for California!).

138. According to the Acting BIA Director, as of April 2018, there were 21 pending gaming applications, less than two percent of the total pending fee-to-trust requests. *Tribal homelands hit a wall under President Trump after historic Obama era*, INDIANZ (Apr. 25, 2018), <https://www.indianz.com/News/2018/04/25/>

Meanwhile, on the Senate side, Senator Daniel Akaka introduced legislation reaffirming the authority of the Secretary to acquire land in trust for all federally recognized tribes, with an effective date of June 18, 1934.<sup>139</sup> The bill was referred to the Senate Committee on Indian Affairs, which did not hold a legislative hearing. However, the Senate Committee held an oversight hearing on the “*Carcieri* Crisis.”<sup>140</sup> With one exception, all of the testimony at the hearing discussed the devastating impacts of the *Carcieri* decision on Indian country and urged Congress to quickly enact a clean *Carcieri* fix.<sup>141</sup> However, the California State Association of Counties (“CSAC”) provided a statement opposing a clean fix, and instead urged Congress to address *Carcieri* as part of “broader trust reform legislation.”<sup>142</sup> CSAC’s statement foreshadowed later debates and lobbying efforts that would make passing a clean *Carcieri* fix impossible.

The Senate Committee reported the Akaka *Carcieri* fix favorably in a business meeting and heavily criticized the handling of the *Carcieri* litigation by the Department of Justice and the Interior Solicitor’s Office.<sup>143</sup> The full Senate never took action on the Akaka bill.

Following the Supreme Court’s decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*,<sup>144</sup> the Senate Committee on Indian Affairs held a second oversight hearing during the 112<sup>th</sup> Congress on *Carcieri* on September 13, 2012.<sup>145</sup> After *Carcieri* the United States took the position that, once the Department acquired land in

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tribal-homelands-hit-a-wall-under-presid.asp.

139. S. 676, 112th Cong. (as introduced, Mar. 30, 2011).

140. *Oversight Hearing on the Carcieri Crisis: The Ripple Effect on Jobs, Economic Development and Public Safety in Indian Country: S. Comm. on Indian Affairs*, 112th Cong. (Oct. 13, 2011).

141. *Id.* These impacts included: “a more burdensome and uncertain fee to trust process;” an increase in costly litigation; barriers to economic development, including access to capital and job growth; and the creation of two classes of tribes. *Id.* at 10 (prepared statement of the Hon. Larry Echo Hawk, Assistant Sec’y for Indian Affairs); *id.* at 24 (prepared statement of Richard Guest, Staff Att’y, NARF); *id.* at 38–39 (prepared statement of William Lomax, President, Native Am. Finance Officers Ass’n).

142. *Id.* at 51.

143. *Id.* at 2, 5–7, S. REP. NO. 112-166 (May 17–20, 23–26, 2012).

144. 567 U.S. 209 (2012). *See generally infra* § III(b).

145. *Addressing the Costly Administrative Burdens and Negative Impacts of the Carcieri and Patchak Decisions: Hearing before the S. Comm. on Indian Affairs*, S. Hrg. 112-710, 112th Cong. (Sept. 13, 2012) [hereinafter S. Hrg. 112-710].

trust on behalf of an Indian tribe, subsequent challenges were barred by the “Indian lands” exception of the Quiet Title Act (“QTA”), 28 U.S.C. §2409a.<sup>146</sup> In *Patchak*, the Supreme Court disagreed, holding that the QTA does not bar judicial review under the APA unless the plaintiff seeks to quiet title to the property at issue.<sup>147</sup> Therefore, because plaintiff David Patchak did not seek quiet title himself, his claim could proceed under the APA, despite the trust status of the land.<sup>148</sup> The *Patchak* decision sent shockwaves through Indian country, as tribes became concerned that decades-old trust acquisitions could be reversed on *Carcieri* or other grounds.<sup>149</sup>

At the 2012 oversight hearing, NCAI testified that the fee-to-trust process was under attack through “harassment litigation” against tribes regarding their status in 1934 and through retroactive challenges to trust land acquisitions following *Patchak*.<sup>150</sup> Other panelists testified about the urgent need for congressional action to fix *Carcieri* and reaffirm past trust acquisitions, noting the costly burdens, including litigation, and uncertainty imposed by both the *Carcieri* and *Patchak* decisions.<sup>151</sup> However, the CSAC, in a written statement, urged Congress to enact legislation to amend the land-into-trust process generally in accordance with the views of state and local governments.<sup>152</sup>

In the next congressional session, in 2013, the Senate Committee on Indian Affairs held a hearing entitled “*Carcieri*: Bringing Certainty to Trust Land Acquisitions.”<sup>153</sup> The same battle lines were drawn again, including those linking a *Carcieri* fix to the negative effects of fee-to-trust

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146. See *supra* note 104.

147. *Patchak*, 567 U.S. at 217, 220–221.

148. *Id.*

149. S. Hrg. 112-710, *supra* note 145, at 12 (prepared statement of Hon. Jefferson Keel, President, NCAI).

150. *Id.*

151. *Id.* at 8 (prepared statement of Donald “Del” Laverdure, Acting Assistant Sec’y for Indian Affairs), 13 (statement of John EchoHawk, Exec. Dir., Native American Rights Fund), and 26-27 (prepared statement of Colette Routel).

152. S. Hrg. 112-710, *supra* note 145, Appendix at 31 (prepared statement, Prepared Statement of Mike McGowan, President, California State Association of Counties).

153. *Carcieri: Bringing Certainty to Trust Land Acquisitions: Hearing before the Senate Comm. on Indian Affairs*, 113th Cong. (Nov. 30, 2013).

acquisitions and gaming on local communities.<sup>154</sup> Also in the 113th Congress, Senator Jon Tester and Representative Cole and Markey introduced *Carcieri* bills mirroring prior proposed fixes, none of which progressed far in the legislative process.<sup>155</sup>

Despite Congress' failure to enact a clean *Carcieri* fix in the years following *Carcieri*, Congress did enact a tribe-specific *Carcieri* related bill in the 113th Congress: the Gun Lake Trust Land Reaffirmation Act ("Gun Lake Act" or "Act").<sup>156</sup> The Gun Lake Act "ratified and confirmed" Interior's 2009 trust acquisition for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan ("Gun Lake" or "Gun Lake Band"),<sup>157</sup>

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154. Senator Feinstein, for example, stated that any *Carcieri* fix "must address concerns about tribal gaming." *Id.* at 6 (prepared statement of Sen. Dianne Feinstein). Diane Dillon, Supervisor, Napa County Board of Supervisors, also insisted on a fix that would address state and local concerns, describing *Carcieri* as "an historic opportunity." *Id.* at 33 (prepared statement of Diane Dillon). On the other side of the debate, the Assistant Secretary of Indian Affairs testified in favor of a clean *Carcieri* fix, noting that the Department was "up to our eyeballs in litigation." *Id.* at 13 (response to questioning by Assistant Sec'y for Indian Affairs). NCAI also testified in support of a clean *Carcieri* fix, noting that state and local governments already have a role in the land-into-trust process, and describing the devastating impacts of the decision on Indian country. *Id.* at 22, 24 (prepared statement of Jacqueline Johnson-Pata, Exec. Dir.).

155. Senator Tester's bill, identical to his proposed fix in the previous Congress, was reported favorably out of the Senate Committee on Indian Affairs after a hearing but never taken up by the full Senate. S. 2188, 113th Cong. (introduced Mar. 31, 2014); *Legislative Hearing to Receive Testimony on Several Bills, including S. 2188* before the S. Comm. on Indian Affairs, 113th Cong. (May 7, 2012) (testimony of Kevin K. Washburn, Assistant Sec'y for Indian Affairs, and Brian Cladoosby, President, NCAI) (both Interior and NCAI spoke out strongly in favor of a clean *Carcieri* fix). Representative Cole introduced a bill that would have, like his earlier bills, revised the definitions of "Indian" and "tribe" to address *Carcieri* but it died in subcommittee without a hearing. H.R. 279, 113th Cong. (introduced Jan. 15, 2013). Representative Markey introduced a bill identical to the Senate bill, which was referred to subcommittee where no action was taken. H.R. 666, 113th Cong. (introduced Feb. 13, 2013).

156. Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (Sept. 26, 2014).

157. *Id.* at § 2(a). The Gun Lake Act provided that "an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed." *Id.*



which had been challenged on *Carcieri* grounds in the previously discussed *Patchak* litigation.<sup>158</sup> The Gun Lake Act effectively ordered the dismissal of Patchak's federal court action.<sup>159</sup> In passing the Act, the Senate explained that the legislation would provide certainty to the status of the land.<sup>160</sup> The House acknowledged that there was "no consensus in Congress on how to address" *Carcieri*, and determined that bills to take specific lands in trust would be, for the time being, "the appropriate means of resolving trust land matters."<sup>161</sup> The House also questioned whether the prior trust acquisition for Gun Lake was lawful, noting that Gun Lake's members "were not recognized and under federal jurisdiction on the date of the enactment of the IRA."<sup>162</sup> Thus, despite the significance of Congress providing certainty as to the status of Gun Lake's trust lands, such progress must be measured against the statements by certain members of Congress taking a broad view of *Carcieri* and refusing to move forward with a clean *Carcieri* fix.

### 3. 114th Congress

During the 114th Congress, members of the House and Senate once again introduced three clean *Carcieri* fixes, which tracked the language of previous proposals.<sup>163</sup> All three died in committee without a hearing. Bills to reaffirm all prior trust acquisitions likewise never made it out of committee.<sup>164</sup>

Although not specifically focused on *Carcieri*, in May 2015, the House Subcommittee on Indian, Insular, and Alaska Native Affairs held a

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158. See *infra* Section IV(a)(iv).

159. Gun Lake Act § 2(b).

160. S. REP. NO. 113-194 at 2 (2014).

161. H. REP. NO. 113-590 at 3 (2014).

162. *Id.*

163. H.R. 249, 114th Cong. (introduced Jan. 9, 2015); H.R. 407, 114th Cong. (introduced Jan. 20, 2015); S. 732, 114th Cong. (introduced Mar. 12, 2015).

164. S. 1931, 114th Cong. (introduced Aug. 4, 2015); H.R. 407, 114th Cong. (introduced Jan. 20, 2015). Senator Barrasso held a roundtable discussion to discuss a way forward on *Carcieri*, but, like prior hearings, panelists advanced their positions either for or against a clean *Carcieri* fix and land-into-trust without any progress towards a legislative fix. *Roundtable Discussion on the Carcieri v. Salazar Supreme Court Decision and Exploring a Way Forward*, 114th Cong. (Mar. 25, 2015).

hearing attacking Interior's approach to land-into-trust.<sup>165</sup> The title of the hearing, "Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934," demonstrated the Republican majority's antagonism towards the existing land-into-trust process.<sup>166</sup> Ignoring the fee-to-trust regulations, the handbook, countless decisions upholding Section 5 of the IRA,<sup>167</sup> and specific fee-to-trust decisions, the Hearing Memorandum asserted that there were no "limits, conditions, or guidelines" on the Secretary's authority to acquire land in trust under Section 5.<sup>168</sup> The memorandum further asserted that Interior's legal opinion on *Carcieri*, discussed in Section III(b)(ii), "effectively defines the term 'under federal jurisdiction' in a manner that—unsurprisingly—serves to render the Supreme Court's ruling meaningless and empower the Secretary to take lands in trust for a tribe at any time."<sup>169</sup> The Hearing Memorandum also complained that Interior had failed to provide the committee with information regarding how many tribes are affected by *Carcieri*.<sup>170</sup>

In the Senate, Senator Barrasso introduced the Interior Improvement Act, which simultaneously addressed *Carcieri* and overhauled the land-into-trust process.<sup>171</sup> The committee amended the bill and reported it to the full Senate.<sup>172</sup> The bill would have revised the first definition of Indian to authorize fee-to-trust acquisitions for all federally recognized tribes and provided a new process for off-reservation acquisitions.<sup>173</sup> Under the proposed process, tribes that had cooperative agreements with local governments would enjoy expedited treatment of their fee-to-trust applications, and an application could be "deemed

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165. *Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934: Oversight Hearing Before the H. Subcomm. on Indian, Insular and Alaska Native Affairs*, 114th Cong. (May 14, 2015).

166. *Id.*, Mem. from Majority Staff, Subcomm. On Indian, Insular and Alaska Native Affairs, to Nat. Res. Comm. Members [hereinafter Hearing Memo].

167. See e.g., *Michigan Gaming Opposition v. Kempthorne*, 525 F.3d 23, 30-33 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009); *South Dakota v. U. S. Dep't of Interior*, 423 F.3d 790, 796-99 (8th Cir. 2005).

168. Hearing Memo, *supra* note 166, at 3.

169. *Id.* at 4.

170. *Id.*

171. S. 3879, 114th Cong. (introduced July 28, 2015).

172. S. REP. NO. 114-279 (2016).

173. *Id.* at § 3.

approved” if Interior did not meet the timelines specified in the bill. The bill also would have increased notice requirements and codified existing regulatory requirements for off-reservation applications.<sup>174</sup> The Senate never acted on the Interior Improvement Act, and it was not reintroduced in the next Congress.

*Carcieri* reversed decades of Interior’s policy of acquiring trust lands for all federally recognized tribes in the lower 48 states. State and local governments and other fee-to-trust opponents turned congressional debate and action on a possible fix into a debate about fee-to-trust generally and not just the Secretary’s statutory authority. Ultimately, the opposition proved too much, and with each successive Congress, there has been diminishing congressional activity on a possible fix. Therefore, it has been left to Interior to issue and defend individual decisions regarding whether specific tribes were under federal jurisdiction in 1934. While Interior has successfully defended each of its determinations that a tribe was under federal jurisdiction in 1934—as predicted by tribes and representatives at the first hearing following *Carcieri*—the cost to Interior and tribes has been significant.

#### B. *The Department of the Interior’s Response*

The United States argued *Carcieri* in the waning days of the George W. Bush administration, at a time when Interior was skeptical of both land-into-trust generally, and off-reservation and gaming acquisitions in particular.<sup>175</sup> When *Carcieri* was decided—barely a month after President Barack Obama took office—new political appointees had either just started or had yet to be appointed or confirmed at the Departments of Justice and Interior.<sup>176</sup> The new political appointees wanted to reassure

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174. *Id.*

175. See e.g. Mem. from Assistant Sec’y Carl Artman to Reg’l Dirs., *Guidance on taking off-reservation land into trust for gaming purposes* (Jan. 3, 2008), <https://turtletalk.files.wordpress.com/2008/01/artman0103081.pdf>.

176. The Senate unanimously confirmed Secretary Salazar on January 20, 2009. *Ken Salazar Confirmed as 50th Secretary of the Interior*, U.S. DEP’T OF INTERIOR (Jan. 20, 2009), [https://www.doi.gov/news/pressreleases/2009\\_01\\_20\\_release](https://www.doi.gov/news/pressreleases/2009_01_20_release). Assistant Secretary of Indian Affairs Larry EchoHawk was confirmed on May 20, 2009. *Senate Approves Nomination of Larry Echo Hawk for Assistant Secretary for Indian Affairs*, S. COMM. ON INDIAN AFFAIRS (May 20, 2009) <https://www.indian.senate.gov/news/press-release/senate-approves-nomination->

tribes who were frustrated with the land-into-trust policies of the Bush administration.<sup>177</sup> These appointees faced pressure to forcefully respond to the *Carcieri* decision, which Indian country viewed as devastating and wrongfully decided. It quickly became evident in the aftermath of *Carcieri* that a quick fix (either legislative or administrative) was unlikely, leading one commentator to later describe the decision as an “albatross” around the neck of the Obama administration.<sup>178</sup>

Three days after the Supreme Court decided *Carcieri*, Interior Secretary Ken Salazar expressed his “disappoint[ment],” and committed to “supporting the ability of all federally recognized tribes to have lands acquired in trust.”<sup>179</sup> Two weeks later, by memorandum dated March 12, 2009, George Skibine, the Deputy Assistant Secretary for Policy and Economic Development, issued a memorandum to all BIA Regional Directors (“Skibine Memorandum”) regarding the application of *Carcieri* to pending fee-to-trust acquisitions.<sup>180</sup> The Skibine Memorandum established four classes of tribes: (1) those that were unquestionably under federal jurisdiction in 1934; (2) those with land acquisition authority not derived from Section 5 of the IRA; (3) those with “an organizational history that raises any questions about whether they were under Federal jurisdiction in 1934”; and (4) those who were federally acknowledged, restored, or reaffirmed after June 1934.<sup>181</sup> While applications for fee-to-

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larry-echo-hawk-assistant-secretary-indian-affairs). Solicitor Hilary Tompkins, the first Native American Solicitor of the Department of the Interior, was confirmed on June 18, 2009. ABQ Journal News Staff, *U.S. Senate Confirms Tompkins for Interior Post*, ABQ JOURNAL, June 18, 2009, <https://www.abqjournal.com/17449/u-s-senate-confirms-tompkins-for-interior-post.html>.

177. See e.g. National Congress of American Indians Resolution #PHX-08-008, *Fee to Trust Land Acquisitions* (Oct. 19–24, 2008).

178. Loretta Tuell, *The Obama Administration and Indian Law – A Pledge to Build a Nation-to-Nation Relationship*, THE FEDERAL LAWYER, Apr. 2016, at 46.

179. *Department of the Interior Statement on Carcieri Court Decision*, DOI (Feb. 27, 2009), [https://www.doi.gov/news/pressreleases/2009\\_02\\_27\\_release](https://www.doi.gov/news/pressreleases/2009_02_27_release).

180. Mem. from George Skibine to Reg. Dirs., *Application of the Holding in Carcieri v. Salazar to Pending Requests to Acquire Land-in-Trust* (Mar. 12, 2009), <https://www.standupca.org/gaming-law/land-acquisitions/March%202%2C%202009%20Memo%20to%20Regional%20Directors%20Carcieri%20v.%20Salazar.pdf/view> [hereinafter Skibine memo].

181. *Id.* at 2.

trust acquisitions from the first two groups could continue to be processed, the BIA was directed to seek advice from the Solicitor's Office for applications from the latter two groups.<sup>182</sup>

The Skibine Memorandum did not define "under federal jurisdiction" or explain how the Supreme Court's holding should be applied, other than to note that the 1947 report, *Ten Years of Tribal Government under the Indian Reorganization Act* by Theodore H. Haas ("the Haas list"), would be "helpful as a starting point."<sup>183</sup> The Haas list identifies, *inter alia*, most of those tribes that held Section 18 elections under the Secretary in the years following the IRA's enactment and voted to accept or reject the IRA.<sup>184</sup> The Skibine Memorandum also requested information about tribes and trust acquisitions from the regional BIA offices, aiming "to identify tribes that may be impacted by the *Carcieri* decision."<sup>185</sup> Although tribes initially expressed concern that Interior might use information collected under the Skibine Memorandum to compile a list of tribes who were or were not under federal jurisdiction, Interior later clarified that it did not intend to prepare a list.<sup>186</sup> At congressional hearings, Interior officials explained that all tribes were affected by *Carcieri* because the Department must issue a *Carcieri* determination for any tribe seeking land-into-trust under the first definition of "Indian" in the IRA.<sup>187</sup>

Interior also held three tribal consultation sessions to receive tribal input on how Interior should respond to the *Carcieri* decision.<sup>188</sup> At the

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182. *Id.*

183. *Id.*

184. Theodore H. Haas, *Ten Years of Tribal Government Under I.R.A.*, U.S. INDIAN SERVICE, Table A (1947), <https://www.doi.gov/sites/doi.gov/files/migrated/library/internet/subject/upload/Haas-TenYears.pdf> [hereinafter Haas list].

185. Skibine memo, *supra* note 180, at 1.

186. *Carcieri* Tribal Consultation, Arlington Session Transcripts, BIA U.S. DEP'T OF INTERIOR 15 (July 8, 2009), <https://www.indianaffairs.gov/as-ia/consultations/tribal-consultations-archive> [hereinafter Arlington Consultation].

187. *See, e.g., Carcieri: Bringing Certainty to Trust Land Acquisitions: Hearing before the S. Comm. on Indian Affairs*, 113th Cong. 13 (Nov. 30, 2013) (responses of Assistant Sec'y for Indian Affairs Kevin K. Washburn to questions).

188. Letter from Assistant Sec'y for Indian Affairs Larry EchoHawk to Tribal Leaders (June 9, 2009), <https://www.bia.gov/sites/bia.gov/files/sites/bia.gov/files/as-ia/consultation/idc002746.pdf>. The Director of the Office of Indian Gaming also attended a *Carcieri* strategy session with the United South and Eastern Tribes ("USET") on May 12, 2009. *Carcieri v. Salazar* United South and Eastern Tribes

consultation sessions, Interior requested tribal perspective on possible legislation to respond to *Carcieri* as well as input on whether Interior should amend its fee-to-trust regulations to define “under federal jurisdiction.”<sup>189</sup> Although there was consensus that immediate action needed to be taken to address *Carcieri*, tribes had differing views on what that action should look like.<sup>190</sup> Some tribes expressed concern that regulatory changes would lead to litigation and preferred a legislative approach,<sup>191</sup> whereas other tribes expressed concerns that Congress would be unable to enact legislation and supported Interior taking regulatory action.<sup>192</sup> Other tribes supported both routes.<sup>193</sup> Several tribes argued Interior should take the position that all federally recognized tribes were under federal jurisdiction in 1934, or otherwise respond to *Carcieri* in a manner that would indiscriminately permit trust acquisitions for all tribes.<sup>194</sup> In response to questions about whether the land-into-trust process had stalled because of *Carcieri*, Interior officials explained that Interior was continuing to move forward with land-into-trust but was also taking a hard look at how to respond to *Carcieri*.<sup>195</sup>

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Strategy Meeting, Session Summary, BIA (MAY 12, 2009), <https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/pdf/idc-001875.pdf>. The President of USET argued that Interior should interpret “under federal jurisdiction” to include all federally recognized tribes. *Id.* at 1.

189. BIA, *Carcieri* Tribal Consultation Informational Powerpoint, U.S. DEP’T OF INTERIOR (JUNE 9, 2009), <https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/pdf/idc-002458.pdf>.

190. See, e.g., *Carcieri v. Salazar* Tribal Consultation Session Summary, Bloomington, Minnesota, U.S. DEP’T OF INTERIOR (June 29, 2009) [hereinafter Bloomington Consultation]; *Carcieri v. Salazar* Tribal Consultation Session Summary, Sacramento, California, U.S. DEP’T OF INTERIOR (July 1, 2009) [hereinafter Sacramento Consultation]; Arlington Consultation, *supra* note 186 (all available at <https://www.indianaffairs.gov/as-ia/consultations/tribal-consultations-archive>).

191. Bloomington Consultation, *supra* note 190, at 3, 7; Sacramento Consultation, *supra* note 190, at 8; Arlington Consultation, *supra* note 186, at 25–26, 66.

192. Bloomington Consultation, *supra* note 190, at 2, 5.

193. Sacramento Consultation, *supra* note 192, at 5, 6, 8–9; Arlington Consultation, *supra* note 186, at 70, 116.

194. Bloomington Consultation, *supra* note 190, at 5, 6; Sacramento Consultation, *supra* note 190, at 5, 6, 10; Arlington Consultation, *supra* note 186, at 41, 73.

195. Arlington Consultation, *supra* note 186, at 62.

In addition to answering the question of how to address *Carcieri* in fee-to-trust applications going forward, Interior also addressed *Carcieri* challenges to prior secretarial decisions. As a result of the Supreme Court's grant of certiorari in *Carcieri*, David Patchak, who resided close to property held in trust and used for gaming purposes by the Gun Lake Band, challenged Interior's authority to acquire land in trust for the Band.<sup>196</sup> The crux of his argument was that the Gun Lake Band was not federally recognized in 1934; therefore, Interior lacked authority to acquire land in trust for the Band.<sup>197</sup> At the *Carcieri* consultations, Interior committed to forcefully defend against the challenge under the QTA<sup>198</sup> as well as any challenges to the status of land already held in trust.<sup>199</sup> However, questions remained about whether Interior would be successful.<sup>200</sup>

Following the consultations, Interior weighed several options for responding to *Carcieri* in future fee-to-trust applications. In a letter to Senator Bryon Dorgan, Interior announced its support for Dorgan's proposed clean *Carcieri* fix in Congress, which would clarify the Secretary's authority to acquire land in trust for all federally recognized tribes without making other changes to the land-into-trust process or any

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196. Patchak v. Salazar, 646 F. Supp. 2d 72, 75–76 (D.D.C. 2009), *rev'd and remanded*, 632 F.3d 702 (D.C. Cir. 2011), and *rehearing en banc denied* (Mar. 28, 2011), *aff'd sub nom* Match-E-Be-Nash-She-Wish Band v. Patchak, 567 U.S. 209 (2012). Patchak's lawsuit ultimately led Congress to enact the Gun Lake Act, discussed *supra* § III(a)(2).

197. Patchak, 646 F. Supp. 2d at 75.

198. 28 U.S.C. § 2409a. With limited exception, the QTA waives the United States' sovereign immunity from a suit by a plaintiff asserting an interest in real property that conflicts with an interest claimed by the United States. *Id.* § 2409a(d). The waiver of sovereign immunity does not apply, however, to "trust or restricted Indian lands." *Id.* § 2409a(a). The United States argued that all challenges to the United States' title in trust or restricted land were therefore barred by the QTA's Indian lands exception. *E.g.*, Answering Brief of Defendants-Appellees (Initial Brief) at 23–24, Patchak, 646 F. Supp. 2d 72 (D.C. Cir. 2011) (No. 09-5324).

199. In fact, other litigation had sprung up—a citizens' group in California challenged a decades old trust acquisition for the Jamul Indian Village of California on *Carcieri* grounds. Brief of Plaintiffs-Appellants at 13–14, Rosales v. U.S., 89 Fed. Cl. 565 (Fed. Cl. 2009) (No. 10-5028) (arguing that the United States did not hold land in trust for the JIV it acquired decades earlier because the Tribe was not under federal jurisdiction in 1934).

200. Arlington Consultation, *supra* note 186, at 28–29, 64.

other statutory or regulatory schemes.<sup>201</sup> The President and Interior maintained support for a clean fix throughout the remainder of the Obama administration; for example, the fix was included annually in the President's budget requests beginning in fiscal year 2012.<sup>202</sup>

Other actions proved more difficult. Regarding the administrative fix debated at the consultations, questions arose about whether it would be best accomplished through changes to the fee-to-trust regulations at Part 151; a new stand-alone regulation defining "Indian" under the IRA; changes to the acknowledgment regulations; and/or a Solicitor's Opinion.<sup>203</sup> To this day, Interior has not promulgated any regulations addressing *Carcieri*, although it has set forth a Solicitor's Opinion, as detailed in Section III(b)(ii).

Even more problematic for Interior was how to define "under federal jurisdiction." At the consultations, tribes argued that based on the plenary power of the federal government in Indian affairs, "under federal jurisdiction" should mean all federally recognized tribes.<sup>204</sup> This "plenary power" argument was advanced in a submission provided by the Cowlitz Indian Tribe ("Cowlitz" or "Cowlitz Tribe")<sup>205</sup> to Interior in support of the

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201. Letters from Secretary Ken Salazar, U.S. Sec'y of Interior, to the Hon. Bryon Dorgan (Oct. 23, 2009 and July 30, 2010) (included in S. REP. NO. 111-247, 111th Cong., 12-13 (2010)).

202. Lack of Adequate Standards Hearing, *supra* note 54 (statement of Kevin K. Washburn, Assistant Sec'y for Indian Affairs).

203. *E.g.*, Arlington Consultation, *supra* note 186, at 59; *see also* Howard L. Highland, *A Regulatory Quick Fix for Carcieri*, 63 ADMIN. L. REV. 933 (Fall 2011) (arguing that Interior could "fix" the *Carcieri* problem, at least for tribes acknowledged pursuant to Part 83, by asserting its authority under 25 U.S.C. §§ 2 and 9).

204. *E.g.*, Arlington Consultation, *supra* note 186, Comments of Randy Noka on behalf of NCAI, at 41. As explained by the Supreme Court, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004).

205. In the interest of consistency, throughout this Article we cite to tribal names as they appear on the List of Federally Recognized Tribes currently published in the Federal Register. 84 Fed. Reg. 1200 (Feb. 1, 2019). In some instances, a tribe has changed its name since the tribe first submitted its fee-to-trust application, and Interior and court decisions may refer to a tribe by another name.



Tribe's fee-to-trust application.<sup>206</sup> As explained by Cowlitz, the Constitution "endows the United States Congress with plenary authority—*i.e.*, plenary legal *jurisdiction*—over all Indian tribes."<sup>207</sup> Cowlitz relied on the Webster's Dictionary definition of "jurisdiction" from 1934, which defined jurisdiction as the "authority of a sovereign power to govern or legislat[e]; power or right to exercise authority; control."<sup>208</sup> Cowlitz further reasoned that "Congress' jurisdiction over Indian tribes, is, as a legal matter, continuous and uninterrupted unless the tribe itself ceases to exist."<sup>209</sup> The failure or "disinclination" of Congress to exercise jurisdiction over a tribe did not "diminish the continued existence of that legal authority."<sup>210</sup> Applying this argument, by virtue of Congress' plenary power over them, all tribes were under federal jurisdiction in 1934; therefore, all tribes are eligible for trust land acquisition.

In July 2009, Interior announced that responding to *Carcieri* was its top priority; however, the Department could not commit to a timeframe for a fix, though it was looking at different interpretations of "under federal jurisdiction" in 1934.<sup>211</sup> For the first year and a half after *Carcieri* was decided, Interior took no formal administrative action on *Carcieri* and declined to promulgate regulations, issue a Secretarial Order, or issue a Solicitor's Memorandum Opinion (these Memorandum Opinions are often referred to as M-Opinions).<sup>212</sup> Frustrated with the pace of Interior's response, in June 2010, the NCAI enacted a resolution describing Interior's inaction on *Carcieri* and fee-to-trust as "a failure of the trust obligation to take such lands into trust for the benefit of Indian tribes

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206. Cowlitz Indian Tribe, *Fee-to-Trust Application and Reservation Proclamation Request Supplemental Submission on Carcieri's "Under Federal Jurisdiction" Requirement*, at 1 (June 18, 2009), <https://turtletalk.files.wordpress.com/2009/11/cowlitz-carcieri-submission.pdf>.

207. *Id.* at 11.

208. *Id.*

209. *Id.* at 13.

210. *Id.* at 14.

211. Arlington Consultation, *supra* note 186, at 74–75.

212. Departmental Manual, 209 D.M. 3.2(A)(11) (U.S. Dep't of Interior March 16, 1992). An "M-Opinion" constitutes "final legal interpretations . . . on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary." *Id.*

across the United States.”<sup>213</sup> Six months later, Interior issued its landmark *Cowlitz* decision, in which it set forth its two-part test for determining whether a tribe was “under federal jurisdiction” in 1934.

### 1. *The Cowlitz Two-Part Framework*

On December 17, 2010, the Department issued a Record of Decision (“ROD”) accepting into trust nine land parcels amounting to roughly 152 acres for the Cowlitz Tribe.<sup>214</sup> This decision marked the first test of *Carcieri*’s impact on recently recognized tribes. The Cowlitz Tribe, which was formally recognized in 2002 through the Department’s acknowledgment process in 25 C.F.R. Part 83,<sup>215</sup> held no land base. It sought the trust acquisition to establish an initial reservation and develop housing, tribal government buildings, a wastewater treatment facility, a cultural center, and a casino resort.<sup>216</sup> The Department determined that the Cowlitz Tribe was under federal jurisdiction in 1934 and, therefore, eligible for trust acquisition.<sup>217</sup> The ROD was subsequently litigated and remanded to the Department because of gaming-related issues.<sup>218</sup> On

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213. Calling on the Secretary of Interior to Follow Through on His Commitment to Acquire Land into Trust, NCAI Resolution #RAP-10-016 (June 20–23, 2010), [http://www.ncai.org/attachments/Resolution\\_lnuZCDWPilZXamRndgbgRkSRNOTGgQVEvSpcZUeVsGNbdFzRnaP\\_RAP-10-016\\_amended.pdf](http://www.ncai.org/attachments/Resolution_lnuZCDWPilZXamRndgbgRkSRNOTGgQVEvSpcZUeVsGNbdFzRnaP_RAP-10-016_amended.pdf).

214. *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe*, Rec. of Decision, (BIA Dec. 2010) [hereinafter *2010 Cowlitz ROD*], [http://cowlitzeis.com/documents/decision\\_package/section\\_1.pdf](http://cowlitzeis.com/documents/decision_package/section_1.pdf).

215. In order to obtain federal acknowledgement, the Cowlitz Tribe had to demonstrate that it existed as an Indian entity on a substantially continuous basis since at least 1878–80, and otherwise satisfy the criteria in 25 C.F.R. Part 83. See *Confed. Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 394 (D.D.C. 2014). The acknowledgment regulations at Part 83 have since been revised. See BIA, Final Rule, 80 Fed. Reg. 37861 (July 1, 2015).

216. *Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe*, Rec. of Decision (BIA Apr. 2013) [hereinafter *2013 Cowlitz ROD*], [http://www.cowlitzeis.com/documents/record\\_of\\_decision\\_2013.pdf](http://www.cowlitzeis.com/documents/record_of_decision_2013.pdf).

217. *2010 Cowlitz ROD*, *supra* note 214, at 77–103.

218. *Confed. Tribes of the Grand Ronde Cmty. v. Salazar*, Nos. 11-384 & 11-378, 2012 WL 3757655 (D.D.C. Mar. 13, 2013).

April 22, 2013, the Department issued a new ROD on remand.<sup>219</sup> The *Carcieri* analysis is substantially the same in the 2010 and 2013 RODs.

The Department's 2013 ROD devoted 28 pages to analyzing the impact of *Carcieri* on the Department's IRA Section 5 authority and the Department's ability to use this authority to acquire trust land for the Cowlitz Tribe.<sup>220</sup> It began by considering *Carcieri*'s holding that the Department may only acquire trust land for tribes that were "under federal jurisdiction" in 1934. The Department found that the Court had not defined or explained the phrase "under federal jurisdiction."<sup>221</sup> Therefore, it was left to the Department to determine whether the phrase had a plain meaning. After considering at length the IRA's legislative history, text, and implementation, as well as relevant dictionary definitions and fundamental principles of federal Indian law, the Department concluded there was no plain meaning of "under federal jurisdiction."<sup>222</sup>

Relying on these same sources, the Department interpreted the phrase as requiring a two-part inquiry.<sup>223</sup> First, the Department examined "whether there is a sufficient showing in the tribe's history" that the tribe was under federal jurisdiction in or prior to 1934.<sup>224</sup> In other words, the Department considered evidence demonstrating the United States had, in 1934 or earlier, "taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instances tribal members—that are sufficient to establish or generally

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219. 2013 Cowlitz ROD, *supra* note 216, at 1.

220. *Id.* at 78–106.

221. *Id.* at 82–83.

222. *Id.* at 84–94. *See id.* at 90 (supporting the lack of an unambiguous or global understanding of which tribes are "under federal jurisdiction" by quoting a 1980 Solicitor's Office opinion that found "it is very clear from the early administration of the [IRA] that there was no established list of 'recognized tribes now under [f]ederal jurisdiction' in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups").

223. 2013 Cowlitz ROD, *supra* note 216, at 94. The Cowlitz Tribe and other parties had argued that all tribes are under federal jurisdiction as a matter of law pursuant to Congress' Constitutional plenary power, and therefore no further inquiry is necessary. *Id.* at 96–97. However, the Department found that relying exclusively on the plenary power doctrine would be at odds with the Supreme Court's decision in *Carcieri*; accordingly, the Department determined there must be a further showing that the federal government *actually exercised* its jurisdiction over the particular tribe. *Id.* at 97 (emphasis added).

224. *Id.* at 94.

reflect federal obligations, duties, responsibility for, or authority over the tribe by the Federal Government.”<sup>225</sup> The Department noted that certain types of federal actions standing alone may conclusively demonstrate federal jurisdiction status, whereas other types of actions, viewed together, sufficiently show that a tribe was under federal jurisdiction.<sup>226</sup>

The second prong of the inquiry required the Department to “ascertain whether a tribe’s jurisdictional status remained intact in 1934.”<sup>227</sup> The Department found this may be illustrated by circumstantial evidence.<sup>228</sup> The Department noted that the absence of federal actions towards a particular tribe during this period did not necessarily reflect the loss or termination of federal jurisdiction.<sup>229</sup> Further, the Department noted that the “lack of probative evidence that the tribe’s jurisdictional status was terminated or lost prior to 1934” strongly indicated that jurisdiction remained intact.<sup>230</sup> As a general evidentiary note, the Department found that the “extensive factual and historical record developed . . . as part of the [Federal Acknowledgment process] establishes significant factual underpinnings relevant to th[e] determination” of whether a tribe was under federal jurisdiction in 1934.<sup>231</sup>

As applied to the Cowlitz Tribe, the Department found the first prong was satisfied by evidence of the federal government’s unsuccessful treaty negotiations with one of the Cowlitz’s predecessor bands in the 1850s and 1860s.<sup>232</sup> The Department determined this was clear indicia of a government-to-government relationship, which was further buttressed by evidence of federal actions to distribute goods to Cowlitz members, enumerate tribal members on the local superintendent’s annual census, and provide educational and medical services to tribal members.<sup>233</sup>

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225. *Id.* at 94–95.

226. *Id.* at 95.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 79.

232. *Id.* at 97–98.

233. *Id.* at 98–99. Additionally, federal officials had considered whether to authorize special legislation for the Cowlitz Tribe that would allow it to bring a land claim against the United States. *Id.* at 100. Although this legislation was never enacted, the Tribe later successfully brought suit before the Indian Land Claims Commission. *Id.*

The Department then applied the second prong of the test and determined that the federal provision of goods and services to the Cowlitz Indians continued in the 1930s, thereby supporting the conclusion that the Tribe remained under federal jurisdiction in 1934.<sup>234</sup> These actions included the attendance of Cowlitz children at BIA schools; authorization of federal expenditures for health services, funeral expenses, and store goods for tribal members; enumeration of tribal members on various types of BIA censuses; and granting of allotments to tribal members.<sup>235</sup> The BIA also approved an attorney contract for the Cowlitz Tribe in 1932, which was close in time to the IRA's enactment.<sup>236</sup>

Taking all the historical evidence into consideration, including the lack of clear evidence that federal jurisdiction was terminated, the Department found the Cowlitz Tribe was under federal jurisdiction in 1934.<sup>237</sup> As a result, the Department determined it had authority pursuant to the IRA to accept the parcels into trust.<sup>238</sup> As discussed in Section IV below, the 2013 ROD and the two-part *Carcieri* framework were immediately challenged in federal court.

## 2. Institutionalization of the Two-Part Framework in M-37029

Following development and application of the two-part *Carcieri* framework to Cowlitz, the Department issued a formal *Carcieri* M-Opinion in 2014.<sup>239</sup> The M-Opinion set forth the Department's legal authority to acquire land in trust following the *Carcieri* decision. Building on its analysis in the Cowlitz fee-to-trust decision, the M-Opinion thoroughly examined the *Carcieri* holding, the remaining ambiguity as to

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234. 2013 Cowlitz ROD, *supra* note 216, at 99–103. See also *id.* at 99 n.115 (acknowledging the potential argument that federal actions toward individual Indians does not sufficiently demonstrate federal jurisdiction over the tribe, and rejecting it on the basis of the whole record, which included federal actions vis a vis the Cowlitz Tribe, as well as on the basis of the federal acknowledgment decision which found that the Tribe had continuously existed since at least 1855).

235. *Id.* at 99–103.

236. *Id.* at 103.

237. *Id.* at 106. The Department also expressly considered, and rejected, arguments raised by third parties contesting the Tribe's jurisdictional status. See *id.* at 103–106.

238. 2013 Cowlitz ROD, *supra* note 216, at 106.

239. *Carcieri* M-Opinion, *supra* note 56.

the meaning of “under federal jurisdiction,” and the necessary backdrop of both federal Indian law and principles of judicial deference to agency interpretations.<sup>240</sup> Importantly, the M-Opinion institutionalized the two-prong test adopted in *Cowlitz*, wherein the Department must determine: (1) whether there is a sufficient showing in a tribe’s history that during or prior to 1934, the tribe was under federal jurisdiction; and (2) whether the tribe’s jurisdictional status remained intact in 1934.<sup>241</sup>

The M-Opinion constitutes an essential resource for an Indian law attorney with a fee-to-trust practice. Because the M-Opinion is comprehensive, this Article will only highlight the most critical aspects. First, the M-Opinion fleshed out the types of evidence relevant to or determinative of federal jurisdiction but did not provide an exhaustive list. Relevant evidence includes: “the negotiation of and/or entering into treaties; the approval of contracts between a tribe and non-Indians; enforcement of the Trade and Intercourse Acts (Indian trader, liquor laws, and land transactions); education of Indian children at BIA schools; and the provision of health or social services to a tribe.”<sup>242</sup> Evidence is considered on a case-by-case basis.<sup>243</sup> The M-Opinion also determined that tribes who voted on whether to opt out of the IRA in the years immediately following the IRA generally need not make an additional showing of federal jurisdiction.<sup>244</sup> This remains true regardless of how the tribe voted, because the holding of the election itself is clear contemporaneous evidence that the federal government found the underlying tribe met the IRA’s definition of “Indian” and was therefore subject to the Act’s provisions.<sup>245</sup>

The M-Opinion also elucidated the second prong of the test—whether jurisdiction remained intact in 1934—by explaining that federal jurisdiction may, during certain periods, exist but lie dormant.<sup>246</sup> Further, “evidence of executive officials disavowing federal responsibility in certain instances cannot, in and of itself, terminate federal jurisdiction

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240. *See generally id.*

241. *Id.* at 19.

242. *Id.* at 19.

243. *Id.* at 23.

244. *Id.* at 20 (discussing IRA Section 18, which allowed reservation Indians to vote on whether to opt out of the Act).

245. *Id.* at 21.

246. *Id.*

without express congressional action.”<sup>247</sup> This latter point highlights the importance of Congress’ plenary power over Indian tribes, a foundational legal principle the M-Opinion explained should be considered in all determinations of federal jurisdiction.<sup>248</sup> However, the M-Opinion again rejected the argument that plenary power and federal jurisdiction (as understood by the *Carcieri* Court) are coterminous, and instead found that *Carcieri* demands the actual *exercise* of federal jurisdiction over a tribe.<sup>249</sup>

The *Carcieri* M-Opinion also clearly differentiated federal recognition from federal jurisdiction.<sup>250</sup> While the *Carcieri* Court held that, pursuant to the first definition of Indian in the IRA, a tribe must have been “under federal jurisdiction” in 1934, the Department rejected the argument that *Carcieri* similarly imposed a temporal requirement on when a tribe is formally recognized.<sup>251</sup> Relying on Justice Breyer’s concurring opinion, the M-Opinion found the IRA “imposes no time limit on recognition,” and “a tribe may have been ‘under federal jurisdiction’ in 1934 even though the Federal Government did not realize it at the time.”<sup>252</sup>

Moreover, the M-Opinion explained that untethering formal federal recognition from 1934 jurisdiction is reasonable in light of the evolving concept of federal recognition and the practical realities at the time of the IRA. The M-Opinion found the term “recognized Indian tribe” has historically been used in various ways, including the cognitive or quasi-anthropological sense (which is the sense reflected in the IRA’s

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247. *Id.*

248. *Id.* at 12–16.

249. *Id.* at 18 (“I believe that the Supreme Court’s ruling in *Carcieri* counsels the Department to point to some indication that in 1934 the tribe in question was under federal jurisdiction. Having indicia of federal jurisdiction beyond the general principle of plenary authority demonstrates the federal government’s exercise of responsibility for and obligation to an Indian tribe and its members in 1934.”).

250. See 2013 Cowlitz ROD, *supra* note 216, at 87–89. The *Carcieri* M-Opinion elaborated on analysis that contrasted federal recognition with federal jurisdiction in the Cowlitz decision.

251. See 25 U.S.C. § 5129; *Carcieri* M-Opinion, *supra* note 56, at 24. The full statutory definition of “Indian” that was at issue in *Carcieri* covers “persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.”

252. *Carcieri* M-Opinion, *supra* note 56, at 24 (internal quotation and citation omitted).

legislative history) as well as the legal or political sense.<sup>253</sup> It further explained that the process for obtaining such political recognition has evolved substantially over the course of the United States' dealings with tribes.<sup>254</sup> Presently, recognition or "federal acknowledgment" is typically attained through a formal departmental process, established in 1978 and codified at 25 C.F.R. Part 83.<sup>255</sup> Yet this formal acknowledgment process did not exist in 1934 when the IRA was enacted, and historically, political recognition of a tribe occurred on a case-by-case or ad hoc basis.<sup>256</sup> So, contrary to what one might assume, in 1934 there was no common understanding of the term "recognized Indian tribe," no list of recognized Indian tribes, and no single, formal process for becoming a recognized Indian tribe. However, it is important to note, as the M-Opinion does, that evidence submitted during the modern Part 83 acknowledgment process "may be highly relevant and may be relied on to demonstrate that a tribe was under federal jurisdiction in 1934."<sup>257</sup>

The *Carcieri* M-Opinion provides the legal foundation for most fee-to-trust acquisitions. Nonetheless, the Department has at different times employed alternative legal bases to support trust acquisition decisions.

### 3. *Alternative Approaches*

As an alternative to undertaking the often highly laborious, fact-intensive inquiry into whether a tribe was under federal jurisdiction in 1934, the Department has also used other statutory authorities to effectuate trust land acquisitions. This approach was sanctioned by the *Carcieri* Court, which noted that "[i]n other statutory provisions, Congress chose to expand the Secretary's authority to particular tribes not necessarily encompassed within the definitions of 'Indian' set forth in [Section

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253. *Id.* (describing the cognitive sense as one by which federal officials simply knew or assumed that an entity constituted by an Indian tribe and the political sense as one by which an Indian tribe is recognized as a governmental entity holding a political relationship with the United States government).

254. *Id.* at 24–25.

255. *Id.* Congress may also acknowledge tribes via specialized legislation, however this mechanism for recognition is rare.

256. *Id.*

257. *Id.* at 25.



19].”<sup>258</sup> Alternative authorities relied upon by the Department include the Oklahoma Indian Welfare Act, tribe-specific legislation, the Alaska IRA, and other definitions of “Indian” contained within Section 19 of the IRA.

a. Authority Pursuant to the Oklahoma Indian Welfare Act

In 2011 and 2012, the Department issued two decisions to acquire trust lands in Oklahoma for the United Keetoowah Band of Cherokee Indians in Oklahoma (“UKB”) tribal corporation pursuant to the Oklahoma Indian Welfare Act (“OIWA”).<sup>259</sup> Historically, the UKB was considered a cultural society within the Cherokee Nation aimed at preserving Indian traditions. Congress formally recognized the UKB as a separate tribe in 1946 via special legislation.<sup>260</sup> Following its recognition, the UKB formed a tribal corporation pursuant to Section 3 of the OIWA, which authorizes the formal organization of tribal corporations in Oklahoma and allows such tribal corporations to “enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA].”<sup>261</sup> The UKB then sought to place lands in trust where its community services center was located and where it operated a casino.<sup>262</sup>

Both decisions relied on the OIWA to establish the Department’s authority to acquire trust land. The Department determined that its land acquisition authority was derived from OIWA Section 3, extending the benefits and privileges of the IRA to Oklahoma tribal corporations, thereby implicitly authorizing the Department to acquire trust land for the

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258. *Carcieri v. Salazar*, 555 U.S. 379, 392 (2009).

259. *See Trust Acquisition of Community Services Parcel*, Decision Letter (BIA May 24, 2011) [hereinafter *2011 UKB Decision*]; *Trust Acquisition of Keetoowah Casino Property for the United Keetoowah Band of Cherokee Tribe*, Decision Letter (BIA July 30, 2012) [hereinafter *2012 UKB Decision*], [https://www.cherokeephox.org/Docs/2012/7/6486\\_UKB30July2012.pdf](https://www.cherokeephox.org/Docs/2012/7/6486_UKB30July2012.pdf).

260. *2012 UKB Decision*, *supra* note 259, at 2.

261. *See id.* at 2; 25 U.S.C. § 5203. The UKB corporate charter, approved by the Secretary, expressly set out the tribal corporation’s right to acquire land for the Band. *See* Corporate Charter of the United Keetoowah Band of Cherokee Indians, Oklahoma, sections 1(b), 3(r) (ratified Oct. 3, 1950), <https://www.loc.gov/law/help/american-indian-consts/PDF/51061613.pdf>.

262. *See 2011 UKB Decision*, *supra* note 259, at 1; *2012 UKB Decision*, *supra* note 259, at 1–2.

UKB corporation.<sup>263</sup> Moreover, the Department found *Carcieri* inapplicable to the exercise of IRA benefits by these Oklahoma tribes because *Carcieri*'s limitations attach only to the IRA's definition of "Indian," whereas tribes organized under the OIWA are separately defined under its statutory scheme.<sup>264</sup> Accordingly, the Department did not analyze whether the UKB were under federal jurisdiction in 1934 pursuant to *Carcieri*.<sup>265</sup>

b. Authority Pursuant to Specialized Legislation

The Department invoked alternative legal authority when acquiring trust lands for the Shawnee Tribe of Oklahoma, this time relying on specialized legislation. On January 19, 2018, the Department issued its decision to acquire in trust 102.98 acres of land in Texas County, Oklahoma for the Shawnee Tribe.<sup>266</sup> The Shawnee Tribe originally resided in Pennsylvania but, following several rounds of forced removal, ultimately settled in Oklahoma.<sup>267</sup> Although the Shawnee historically constituted a distinct tribal entity, the federal government imposed the Tribe's integration into the Cherokee Nation following the Civil War.<sup>268</sup> It was not until 2000 that Congress formally recognized the Shawnee Tribe again, as a separate and independent tribal government pursuant to the

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263. 2011 UKB Decision, *supra* note 259, at 4; 2012 UKB Decision, *supra* note 259, at 6.

264. See 2011 UKB Decision, *supra* note 259, at 4. The 2011 UKB Decision only alludes to this argument, which was later fleshed out in more detail in the Federal Government's brief before the 10th Circuit. See Opening Brief for Federal Appellants at 25–27, *Cherokee Nation v. Zinke*, 2017 WL 6017500 (10th Cir. Dec. 1, 2017) (No. 17-7044) (arguing that the District Court "mistakenly conflates the IRA's *benefits*—'rights or privileges' that the OIWA extended to Oklahoma tribes regardless whether those tribes are 'necessarily encompassed within' the IRA's definitions of 'Indian,' *Carcieri*, 555 U.S. at 392—with the IRA's *beneficiaries*, namely, any 'Indian' as defined under the IRA") (emphasis in original).

265. Both decisions were subsequently challenged in federal district court. See *infra* Section IV(a)(vii).

266. *Trust Acquisition of 102.98 acres in Texas County, Oklahoma for the Shawnee Tribe*, Rec. of Decision (BIA Jan. 19, 2018) [hereinafter *2018 Shawnee Decision*], <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/gaming-applications/2018.01.19%20Shawnee%20151%20Decision%20Signed.pdf>.

267. *Id.* at 3.

268. *Id.* at 4.

Shawnee Tribe Status Act.<sup>269</sup> The Act, in addition to restoring the Tribe's recognition, expressly established the Tribe's eligibility to acquire trust lands pursuant to Section 5 of the IRA and Section 1 of the OIWA.<sup>270</sup>

In its 2018 fee-to-trust decision, the Department addressed its legal authority for the Shawnee land acquisition as required by 25 C.F.R. § 151.10(a).<sup>271</sup> It highlighted the *Carcieri* Court's comment that "[i]n other statutory provisions, Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definition of 'Indian' set forth" in the IRA.<sup>272</sup> The Department cited the Shawnee Tribe Status Act as providing such authority, which eliminated the need for the Department to undertake a *Carcieri* analysis of whether the Shawnee Tribe was under federal jurisdiction in 1934.<sup>273</sup>

c. Authority Pursuant to the IRA's Other Definitions of "Indian"

Beyond alternative statutory frameworks, the Department has also relied on multiple sources of authority contained within the IRA itself. In September of 2015, the Department issued a decision to acquire two parcels of land into trust for the Mashpee Wampanoag Tribe ("Mashpee" or "Mashpee Tribe") in Massachusetts.<sup>274</sup> The Mashpee Tribe has a long recorded presence in southeastern Massachusetts, existing before European contact in the 1600s.<sup>275</sup> Similar to the Narragansett Tribe of Rhode Island, the subject of the *Carcieri* litigation, the Mashpee were

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269. *Id.*

270. 2018 *Shawnee Decision*, *supra* note 266, at 4 (citing Pub. L. 106-568, Title VII, 114 Stat. 291 (2000) (*amended by* Pub. L. No. 109-159, 119 Stat. 1939 (Aug. 10, 2005))).

271. *Id.* at 9.

272. *Id.* at 12 (citing Section 7 of the Shawnee Tribe Status Act, which provides that "[t]he Tribe is eligible to have land acquired in trust pursuant to Section 5 of the [IRA] and Section 1 of the [OIWA]").

273. *Id.*

274. *Trust Acquisition and Reservation Proclamation for 151 Acres in the City of Taunton, Massachusetts, and 170 Acres in the Town of Mashpee, Massachusetts, for the Mashpee Wampanoag Tribe*, Rec. of Decision (BIA Sept. 2015) [hereinafter 2015 *Mashpee ROD*], <https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-031724.pdf>.

275. *Id.* at 62.

often left to the authority of the Commonwealth of Massachusetts.<sup>276</sup> Although the federal government intermittently interacted with the Tribe and its members, it typically deferred to Massachusetts' handling of Indian affairs.<sup>277</sup> It was not until 2007 that the federal government formally recognized the Mashpee Tribe through the Part 83 acknowledgment process.<sup>278</sup> Immediately following its acknowledgment, the Mashpee Tribe submitted an application for the Department to acquire in trust land in the Town of Mashpee for governmental services, cultural preservation, and housing, as well as land in the City of Taunton for a casino-resort.<sup>279</sup> Eight years later, the Department approved the Mashpee Tribe's application.

In contrast to the majority of the Department's fee-to-trust decisions, the Mashpee decision relied exclusively upon the authority of the IRA's second definition of Indian: "[A]ll persons who were descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation."<sup>280</sup> As the language indicates, the IRA's applicability pursuant to this definition focuses on reservation residence in 1934, as opposed to membership in a tribe under federal jurisdiction (as contemplated by the first definition).

Since Mashpee provided the first instance in which the Department relied primarily on the oft forgotten second definition, the Department undertook extensive analysis of the statutory language in its decision document. It found the language ambiguous in several respects, including whether the term "such members" incorporated, by reference, the entire first definition of "Indian" and, consequently, the *Carcieri* limitations.<sup>281</sup> To clarify these ambiguities, the Department considered the

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276. See, e.g., *id.* at 117–119.

277. *Id.*

278. *Id.* at 4.

279. *Id.*

280. See *id.* at 80–120. As detailed *supra*, Section II, the *Carcieri* decision addressed the first definition of Indian—"members of any recognized Indian tribe now under Federal jurisdiction"—and did not opine on the remaining categories of Indians set forth in § 19. See also *Carcieri* M-Opinion, *supra* note 56, at 4.

281. 2015 Mashpee ROD, *supra* note 274, at 80–81. Other points of ambiguity identified by the Department include: whether the second definition applies only to individuals or also to tribes; what constitutes a "reservation"; whether "present boundaries" refers to boundaries as of 1934 or at the time of the Act's application; and

IRA's purpose, legislative history, implementation, and other tools of statutory construction.<sup>282</sup> The Department ultimately concluded that "such members" incorporates only "members of recognized Indian tribes" in 1934 and not the phrase "now under Federal jurisdiction" as interpreted by *Carcieri*.<sup>283</sup> Accordingly, the Department held that it need not determine whether the Mashpee Tribe was under federal jurisdiction in 1934 for purposes of satisfying the second definition of Indian.<sup>284</sup> Rather, the test was whether the Mashpee Tribe consists of "descendants of members of a recognized Indian tribe who maintained residence within the boundaries of an Indian reservation as of June 1, 1934."<sup>285</sup> After thoroughly reviewing the historical evidence, the Department concluded that Mashpee satisfied this definition, and therefore, the Department had authority under the IRA to acquire the trust lands.<sup>286</sup>

As described later in this Article, the Department's 2015 decision for Mashpee was successfully challenged in federal district court on several grounds, including the Department's statutory interpretation of the second definition of "Indian."<sup>287</sup>

#### d. Authority Pursuant to IRA Section 13

The Department has also relied on Section 13 of the IRA as statutory authority for trust acquisitions on behalf of certain Oklahoma tribes. In Section 13, Congress excluded the application of certain IRA provisions to 29 tribes in Oklahoma.<sup>288</sup> In a recent fee-to-trust decision

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whether the 1934 residency requirement attaches to "descendants" or to "members." *Id.* at 81.

282. *Id.* at 81–92.

283. *Id.* at 93–95. Regarding the other statutory ambiguities, the Department concluded that: the second definition applied to both individuals and tribes; a "reservation" is land set aside of land for Indian use and occupation; "present boundaries" means as of 1934; and it need not determine whether the 1934 residency requirement attaches to "descendants" or "members," because Mashpee satisfied either interpretation. *Id.* at 92–93, 95–100.

284. *Id.* at 93–95.

285. *Id.* at 101.

286. *Id.* at 120.

287. *See Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016).

288. 25 U.S.C. § 5118 (2018).

for the Muscogee (Creek) Nation, the Department concluded that since certain provisions of the IRA do not apply to Section 13 listed tribes, Congress intended the remaining provisions of the IRA, including Section 5, to apply.<sup>289</sup> Therefore, listing in Section 13 eliminates the need for any further analysis under *Carcieri*.

e. Authority Pursuant to the Alaska IRA

The history of native lands in Alaska is both complicated and singular. Although it is beyond the scope of this Article to delve into the nuances of Alaskan native lands, a brief primer is necessary to understand the Department's post-*Carcieri* approach to Alaska fee-to-trust.

When the IRA was enacted in 1934, Congress excluded Alaska and other U.S. territories from the land acquisition authority set forth in Section 5.<sup>290</sup> However, in 1936, Congress amended the IRA to explicitly extend Section 5 to Alaska, along with the authority to proclaim new Indian reservations in Alaska.<sup>291</sup> Following Alaska's entrance to statehood in 1958 and in response to mounting unresolved Alaskan native land claims, Congress passed the Alaska Native Claims Settlement Act

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289. *Trust Acquisition for The Muscogee (Creek) Nation*, Decision Letter 9 (BIA Apr. 30, 2018), [hereinafter *Muscogee Decision*], [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/gaming-applications/TheMuscogee %28Creek%29 Nation, April 30, 2018, Trust Acquisition Decision Letter.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/gaming-applications/TheMuscogee%28Creek%29Nation, April 30, 2018, Trust Acquisition Decision Letter.pdf).

290. *See* Authority to Acquire Land into Trust in Alaska, Sol. Op. M-37043 at 2 (Dep't of Interior Jan. 13, 2017) [hereinafter M-37043] (citing IRA § 13 (codified at 25 U.S.C. § 5118 (2018))). Although certain provisions were made inapplicable to Alaska, the original IRA expressly included Alaskan natives within its general scope. *See* M-37043 at 2 (citing IRA § 19 (codified at 25 U.S.C. § 5129 (2018)) which includes "Eskimos and other aboriginal peoples of Alaska" in the Act's definition of "Indian").

291. *See id.* at 4 (citing Act of May, 1936, ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 5119 (2018)) ("Alaska IRA"); *see also* Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888 and 76,889 (Dec. 23, 2014) (codified at 25 C.F.R. § 151.1(2018)). The Alaska IRA established two different authorities for designating Indian reservations in Alaska. First, it extended the IRA § 7 reservation proclamation provision to Alaska. Alaska IRA § 1. Second, it created a new authority to designate Indian reservations on various types of land reservations and public lands in Alaska. Alaska IRA § 2.

(“ANCSA”) in 1971.<sup>292</sup> Through ANCSA, Congress extinguished all aboriginal land claims in Alaska in exchange for the transfer of \$962.5 million and 44 million acres of fee land to ANCSA native corporations.<sup>293</sup> Additionally, Congress revoked the existing reservation status of Alaska Indian reserves, with the exception of the Metlakatla Indian Community, Annette Island Reserve.<sup>294</sup> Importantly, ANSCA did not explicitly repeal the applicability of IRA Section 5 to Alaska.<sup>295</sup> Shortly thereafter, in 1976, Congress enacted the Federal Land Policy and Management Act (“FLPMA”). FLPMA rescinded the Department’s authority to establish new Indian reservations in Alaska pursuant to Section 2 of the Alaska IRA but again did not repeal or amend the Department’s IRA Section 5 fee-to-trust authority in Alaska.<sup>296</sup>

Subsequently, the Department grappled with the lack of clarity concerning its fee-to-trust authority in Alaska. Following internal deliberation and guidance from the Solicitor’s Office, the Department initially concluded that it lacked authority to utilize IRA Section 5 to acquire trust lands in Alaska.<sup>297</sup> This position was embodied in the Department’s first set of fee-to-trust regulations, promulgated in 1980, and was known as the Alaska exception.<sup>298</sup> Following litigation on the issue and full reconsideration of the law and policy governing fee-to-trust in Alaska, the Department promulgated a new rule in 2014, which eliminated

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292. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h (2018)) (“ANCSA”).

293. M-37043, *supra* note 290, at 7 (citing 43 U.S.C. §§ 1603(b), 1605, 1607).

294. *Id.* at 7–8 (citing 43 U.S.C. § 1618(a)). ANSCA set forth a new policy promoting the rapid settlement of Native claims in Alaska “without creating a reservation system or lengthy wardship or trusteeship.” 43 U.S.C. § 1601(b).

295. *See* M-37043, *supra* note 290, at 8; Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76889.

296. M-37043, *supra* note 290, at 8 (citing Pub. L. No. 94-579, 90 Stat. 2744 (1976)) (codified as amended at 43 U.S.C. §§ 1701–1787 (2018)).

297. Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76889; M-37043, *supra* note 290 at 8 & n.64.

298. *See* Land Acquisitions, 45 Fed. Reg. 62,034, 62,036 (Sept. 18, 1980) (formerly codified at 25 C.F.R. § 151.1). Although Alaska lands were generally excluded from the fee-to-trust process, the Department provided an exception for acquisitions on behalf of the Metlakatla Indian Community. *Id.*

the Alaska exception from the Part 151 regulations.<sup>299</sup> The new rule was followed in 2017 by a Solicitor's M-Opinion ("M-37043") that supported the continued existence of the Department's land acquisition authority in Alaska and determined that *Carcieri* does not apply to trust acquisitions in Alaska.<sup>300</sup> Yet the change of presidential administration brought with it another pivot of the Department's position on Alaska fee-to-trust. On June 29, 2018, the Solicitor's Office issued M-37053, which withdrew M-37043 and provided for a six-month notice-and-comment period followed by a six-month agency review period on "the Secretary's exercise of his authority to take off-reservation land into trust in Alaska."<sup>301</sup>

Putting aside whether ANSCA, FLPMA, or other federal laws repeal or limit the authority of the Department to acquire trust land in Alaska, the Department's interpretation of *Carcieri*'s impact on Alaska land acquisitions is an open question following M-37053. M-37043 stated that Congress' extension of the IRA to Alaska in 1936 provided independent specific authority for trust acquisitions for Alaskan tribes and, accordingly, *Carcieri* was inapplicable.<sup>302</sup> This position was supported by the *Carcieri* decision itself, which noted that: "[i]n other statutory provisions, Congress chose to expand the Secretary's authority to particular tribes not necessarily encompassed within the definitions of 'Indian' set forth in [Section 19]," expressly citing the Alaska IRA as an

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299. See Land Acquisitions in the State of Alaska, 79 Fed. Reg. at 76,888 (Dec. 23, 2014) (codified at 25 C.F.R. § 151.1 (2018)); see also *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1 (D.D.C. 2013) (finding that ANSCA did not implicitly repeal the Department's fee-to-trust authority in Alaska and the Alaska exception violates the anti-discrimination provision at 25 U.S.C. § 476(g) (now § 5123), and ultimately vacating the Alaska exception from the Part 151 regulations), *vacated on other grounds by Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100 (D.C. Cir. 2016).

300. See generally M-37043, *supra* note 290.

301. Letter from Principal Deputy Sol. to Sec'y, Assistant Sec'y, and Dir. BIA, *Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review*, M-37053 (June 29, 2018) <https://edit.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf> [hereinafter M-37053]. The comment period closed on December 20, 2018. See BIA, *Alaska IRA and Land-into-Trust in Alaska*, DEP'T OF INTERIOR, <https://www.bia.gov/as-ia/raca/regulations-development-and-or-under-review/alaska-ira-and-land-trust-alaska>.

302. M-37043, *supra* note 290, at 9-12.



example.<sup>303</sup> Additionally, the Department found that *Carcieri* does not impact the Department's authority to acquire trust land for the other categories of Indians as set forth in IRA Section 19. Section 19 separately and explicitly provides: "Eskimos and aboriginal peoples of Alaska shall be considered Indians." The Department concluded that these groups need not also qualify as "recognized Indian tribes now under Federal jurisdiction," as set forth in the first definition.<sup>304</sup>

With the issuance of M-37053 and the reopening of the Department's fee-to-trust authority in Alaska, it is unclear whether the Department will maintain its position that *Carcieri* does not limit or prohibit Alaska trust land acquisitions. The outcome may depend, in part, on the comments the Department receives. However, it is important to note that the Department's rationale for withdrawing M-37043 concerned only the legal developments concerning ANCSA, FLPMA, and non-*Carcieri* issues since the Alaska IRA.<sup>305</sup> It did not directly question the validity of the Department's position on *Carcieri*.

## V. THE LITIGATION AFTERMATH OF *CARCIERI*

### A. *Administrative Procedure Act Challenges to Interior Fee-to-Trust Decisions*

Beginning with the original Cowlitz ROD in December 2010, local governments, tribes, citizens' groups, and individuals have challenged Interior's determinations that *Carcieri* does not limit its fee-to-trust authority for particular tribes. Fee-to-trust opponents have also challenged title to land acquired in trust before *Carcieri* was decided. As predicted at the early congressional hearings, these lawsuits have not only challenged whether tribes were under federal jurisdiction in 1934, but also questioned tribes' histories, membership, and even their existence.<sup>306</sup>

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303. *Carcieri*, 555 U.S. 379, 392 & n.6; see also M-37043, *supra* note 290, at 10–12.

304. M-37043, *supra* note 290, at 12–20.

305. See generally M-37053, *supra* note 301.

306. Some of these lawsuits are brought by organizations, characterized by some as anti-Indian hate groups, whose underlying mission is to challenge the exercise of tribal sovereignty in any setting. See Anna V. Smith, *Why Don't Anti-Indian Groups Count as Hate Groups?* HIGH COUNTRY NEWS (Oct. 8, 2018).

Although the majority of *Carcieri* challenges have failed, plaintiffs continue to press the same claims. Despite the continued success of tribes and the United States in defending determinations that tribes were under federal jurisdiction, the never-ending litigation has consumed limited tribal and federal resources. These are resources that otherwise would be spent supporting tribal governments and providing vital services to tribal members.<sup>307</sup> Unless Congress enacts a clean *Carcieri* fix, the lawsuits summarized below will continue for as long as Interior acquires land in trust for tribes.

### 1. Cowlitz Indian Tribe

Following Interior's April 2013 fee-to-trust decision for Cowlitz, the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"), who operate a nearby casino, and a group of plaintiffs including Clark County, the City of Vancouver, a citizens' group, cardrooms, and others, challenged the decision in federal district court, alleging negative impacts from the proposed casino.<sup>308</sup> Plaintiffs argued that Interior's two-part test violated the IRA, and that the Interior lacked authority to acquire land in trust for the Cowlitz because the tribe was neither "recognized" nor "under federal jurisdiction" in 1934.<sup>309</sup> Plaintiffs also challenged Cowlitz's recently expanded enrollment, arguing Interior's failure to consider it voided the fee-to-trust decision.<sup>310</sup> The district court rejected all of plaintiffs' arguments and upheld Interior's decision.<sup>311</sup>

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307. Lack of Adequate Standards Hearing, *supra* note 54 (statement of Kevin K. Washburn, Assistant Sec'y, for Indian Affairs).

308. Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 75 F. Supp. 3d 387 (D.D.C. 2014).

309. *Id.* at 397, 402.

310. *Id.* at 408. In addition, plaintiffs argued that the Secretary erred in determining that the parcel was eligible for gaming under the Indian Gaming Regulatory Act's "initial reservation" exception, and made several environmental challenges. *Id.* at 409, 415.

311. *Id.* at 424. Relevant to *Carcieri*, the court determined that "under federal jurisdiction" was ambiguous and thus Interior's two-part test was entitled to deference under *Chevron*. *Id.* at 404. The court also upheld Interior's application of the two-part test to Cowlitz. *Id.* at 406–08.

Plaintiffs appealed to the Court of Appeals for the D.C. Circuit and the court affirmed.<sup>312</sup> The D.C. Circuit first rejected plaintiffs' argument that the Supreme Court in *Carcieri* had "foreclosed any role" for Interior in interpreting the first definition of Indian.<sup>313</sup> The court concluded that *Carcieri*'s holding "reache[d] only the temporal limits of the Federal-jurisdiction prong," and both "recognized" and "under federal jurisdiction" were ambiguous.<sup>314</sup> Applying *Chevron*, the court held that the Secretary "reasonably interpreted and applied" the IRA in developing the two-part test and concluding that the Cowlitz were a "recognized tribe now under federal jurisdiction."<sup>315</sup> The court upheld Interior's reliance on treaty negotiations and Interior's actions in taking the Cowlitz's land after failed treaty negotiations as evidence of federal jurisdiction over the Cowlitz.<sup>316</sup> The D.C. Circuit also rejected plaintiffs' Indian Gaming Regulatory Act ("IGRA") and tribal membership arguments.<sup>317</sup>

The citizens' group, Citizens Against Reservation Shopping ("Citizens"), as well as the cardrooms, filed a petition for certiorari with the United States Supreme Court.<sup>318</sup> In their petition, Citizens argued that, contrary to Interior's interpretation, the first definition of Indian requires a tribe to have been "recognized" and "under federal jurisdiction" in 1934.<sup>319</sup> Citizens also argued, for the first time, that to be under federal jurisdiction in 1934, Cowlitz needed to reside in Indian country in 1934.<sup>320</sup> The United States, less than two months into the Trump administration, filed a brief opposing Citizens' petition.<sup>321</sup> The Supreme Court denied

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312. *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016).

313. *Id.* at 559.

314. *Id.* at 560, 564.

315. *Id.* at 556.

316. *Id.* at 565.

317. *Id.* at 568–570.

318. Petition for a Writ of Certiorari, *Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017) (No. 16-572). Neither Clark County nor Grand Ronde filed a petition for certiorari.

319. *Id.* at 10.

320. *Id.* at 19.

321. Brief for the Federal Respondents in Opposition, *Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017) (No. 16-572).

Citizens' petition,<sup>322</sup> and the Cowlitz casino has been successful since opening.<sup>323</sup>

## 2. *Ione Band of Miwok Indians*

Interior's two-part *Carcieri* framework was also the issue in litigation challenging a 2012 fee-to-trust decision for the Ione Band of Miwok Indians of California ("Ione" or "Ione Band"). Ione is a successor in interest to the signatories of an unratified treaty between the United States and California Indians in the mid-1800s.<sup>324</sup> In the early 1900s, the Ione occupied an approximately 40-acre tract in Amador County, California.<sup>325</sup> Beginning in 1915, the United States sought to purchase the land for the Ione Band, but title issues prevented the purchase, leaving Ione without a permanent reservation.<sup>326</sup> In 1972, the Commissioner of Indian Affairs sent a letter to the Ione acknowledging it as an Indian tribe, directing the Regional Office to assist the Ione Band in efforts to organize, and agreeing to accept the 40 acres of land in trust.<sup>327</sup> However, the acquisition was never completed,<sup>328</sup> and Interior began to question whether Ione was, in fact, federally recognized. In 1990, Interior argued in litigation that Ione was not a recognized tribe. In 1994, Interior reversed course once again, and, in a letter by then Assistant Secretary Ada Deer, "reaffirm[ed]" the Commissioner's 1972 determination that the Band was recognized.<sup>329</sup> Interior included the Ione on the list of federally recognized

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322. *Citizens Against Reservation Shopping v. Zinke*, 137 S. Ct. 1433 (2017).

323. Marissa Luck, *After Six Months, Business is Booming at Ilani*, THE COLUMBIAN, Nov. 2017, <https://www.columbian.com/news/2017/nov/29/ilani-casino-clark-county-business/>.

324. *Trust Acquisition of the 228.04-acre Plymouth Site in Amador County, California, for the Ione Band of Miwok Indians*, Rec. of Decision 54 (BIA May 2012).

325. *Id.*

326. *Id.*

327. *Id.* at 57.

328. *Id.*

329. *Cty. of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012, 1018 (9th Cir. 2017), *cert. denied*, 139 S.Ct. 64 (2018).

tribes published in the Federal Register the next year.<sup>330</sup> However, the Ione remained landless.

In May 2012, Interior issued a decision to acquire 228 acres of land in Amador County in trust for the Ione Tribe to use for gaming purposes. Amador County and No Casino in Plymouth, a citizens' group, filed separate lawsuits in federal district court challenging the decision on *Carcieri* and IGRA grounds.<sup>331</sup> The County challenged the legitimacy of the Ione Band, arguing that it is not "a separate and distinct tribal entity in its own right."<sup>332</sup> The County argued that Interior did not hold a Section 18 vote on the IRA or an election to organize under Section 16, and thus, the Ione Band was not a distinct tribe under federal jurisdiction in 1934.<sup>333</sup> The district court rejected these arguments, noting that it was reasonable for Interior to conclude that no election was held for Ione because it had no "Rancheria" in 1934.<sup>334</sup> The court declined the County's invitation to "conduct an independent investigation into the genealogy and political history supporting recognition of Ione as a distinct tribe" as beyond its "authority and expertise," and instead deferred to Interior's determination that the Ione Band was a distinct tribe under federal jurisdiction in 1934.<sup>335</sup> The court also rejected the County's argument that Interior's failure to acquire land for Ione meant that Ione was not under federal jurisdiction, finding no support for the County's bare assertion.<sup>336</sup>

In its separate action, the citizens' group also challenged Interior's determination that Ione was under federal jurisdiction in 1934.<sup>337</sup> The citizens' group argued that the Supreme Court's decision in *Carcieri* foreclosed Interior from judicial deference in interpreting "under federal jurisdiction."<sup>338</sup> The district court rejected this argument, noting that the Supreme Court did not interpret "under federal jurisdiction," nor provided standards for being under federal jurisdiction.<sup>339</sup> The court determined

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330. *Id.*

331. *Cty. of Amador v. U.S. Dep't of Interior*, 136 F. Supp. 3d 1193 (E.D. Cal. 2015); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166 (E.D. Cal. 2015).

332. *Cty. of Amador*, 136 F. Supp. 3d at 1210.

333. *Id.* at 1208.

334. *Id.* at 1209–1210.

335. *Id.* at 1213.

336. *Id.* at 1213–1214.

337. *No Casino in Plymouth*, 136 F. Supp. 3d at 1183.

338. *Id.*

339. *Id.* at 1184.

that Interior's determinations under its two-part framework were entitled to deference, and upheld Interior's fee-to-trust decision in both actions.<sup>340</sup>

The County and the citizens' group appealed to the Ninth Circuit. In a short memorandum opinion, the Ninth Circuit dismissed the citizens' group's appeal for lack of organizational standing.<sup>341</sup> The Ninth Circuit affirmed the district court's decision upholding Interior's fee-to-trust decision.<sup>342</sup> The court agreed with Interior that "the better reading" of the first definition of "Indian" is that "now" only modifies "under federal jurisdiction," and a tribe need only be recognized at the time of the fee-to-trust decision.<sup>343</sup> The court upheld Interior's interpretation of "under federal jurisdiction" using its two-part framework and the framework's application to Ione.<sup>344</sup> The court declined to rule on whether *Chevron* deference was owed to Interior in its two-part framework because "we reach the same conclusion as the agency even without it."<sup>345</sup> The court concluded it was reasonable for Interior to interpret its efforts to purchase land for Ione, beginning in 1915, as evidence that Ione was under federal jurisdiction in 1934.<sup>346</sup> The County filed a petition for certiorari with the Supreme Court on *Carcieri* and IGRA grounds, and the petition was denied.<sup>347</sup>

### 3. *Oneida Indian Nation*

The Secretary's application of the two-part framework to trust acquisitions for the Oneida Indian Nation ("Oneida") was also the subject of federal litigation. In May 2008, nine months before the Supreme Court decided *Carcieri*, Interior issued a decision to acquire 13,000 acres of land in trust in central New York for the Oneida.<sup>348</sup> Interior's decision did not

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340. *Id.* at 1192–93; *Cty. of Amador*, 136 F. Supp. 3d at 1197.

341. *No Casino in Plymouth v. Zinke*, 698 Fed. Appx. 531 (9th Cir. 2017).

342. *Cty. of Amador*, 872 F.3d at 1015.

343. *Id.* at 1024.

344. *Id.* at 1027–1028.

345. *Id.* at 1025.

346. *Id.* at 1027.

347. *Petition for a Writ of Certiorari, Cty. of Amador, Cal. v. Dep't of Interior*, 139 S. Ct. 64 (2018) (No. 17-1432).

348. *Oneida Indian Nation of New York Fee-to-Trust Request*, Rec. of Decision (BIA May 2008).

address *Carcieri*.<sup>349</sup> Following the *Carcieri* decision, state and local governments and citizens' groups argued in federal district court that the Oneida were not under federal jurisdiction in 1934, as required by the Supreme Court.<sup>350</sup> Rather than decide that "threshold inquiry"<sup>351</sup> in the first instance, the district court remanded the fee-to-trust decision to the Department to "further develop the record" on the Department's authority to acquire the land in trust.<sup>352</sup> The court recognized Interior's "specific expertise that the Court lacks," and that the *Carcieri* question is "one that requires a detailed analysis of contested, factually-laden historical accounts."<sup>353</sup>

Following the court's remand, Interior requested briefing from the litigants on whether the Oneida were under federal jurisdiction in 1934.<sup>354</sup> Before Interior issued their subsequent decision, the Oneida, the State of New York, Madison County, and Oneida County entered into a historic agreement to settle long standing fee-to-trust, tax, land claim, and gaming issues.<sup>355</sup> The state and counties agreed to abandon their challenges to the 13,000 acre acquisition as well as other legal disputes.<sup>356</sup>

In December 2013, Interior issued an amendment to the original fee-to-trust decision, adopting a 40-page opinion prepared by the Solicitor's Office on the *Carcieri* question.<sup>357</sup> Interior applied its two-part framework and determined that the Oneida were under federal jurisdiction in 1934.<sup>358</sup> Interior's decision relied on evidence of a vote by the Oneida to reject the IRA in 1936; the Treaty of Canandaigua between the Oneida

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349. *Id.*

350. *N.Y. v. Salazar*, Nos. 08-64, 08-648, 08-633, 08-647, 08-660, 2012 WL 4364452 (N.D.N.Y. 2012).

351. *Id.* at \*14.

352. *Id.* at \*1.

353. *Id.* at \*14-\*15.

354. Mem. from Jennifer L. Turner, Assistant Sol., Branch of Env't & Lands, to Kevin K. Washburn, Assistant Sec'y for Indian Affairs, *Determination of Whether the Oneida Indian Nation was Under Federal Jurisdiction in 1934*, at 2 (Dec. 23, 2013) <https://turtletalk.files.wordpress.com/2014/03/344-interior-rod-amendment.pdf> [hereinafter *Memo from Jennifer L. Turner*].

355. Settlement Agreement by the Oneida Nation, the State of N.Y., the Cty. of Madison, and the Cty. of Oneida (May 16, 2013) (on file with State of N.Y.).

356. *Id.* at Art. VI.

357. *Oneida Indian Nation of N.Y. Fee-to-Trust Request*, Am. to the May 20, 2008 Rec. of Decision (BIA Dec. 2013).

358. *Memo from Jennifer L. Turner*, *supra* note 354, at 3.

and the United States in 1794; and land claim litigation brought by the United States on behalf of the Oneida shortly before the IRA's enactment; and other evidence of federal jurisdiction, either taken alone or together.<sup>359</sup> Interior also found it unnecessary to determine whether the Oneida were recognized in 1934; but, in any event, noted that the Oneida have been recognized since the Treaty of Canandaigua in 1794.<sup>360</sup>

Several citizens' groups and two local towns challenged the fee-to-trust decision, including the *Carcieri* opinion. One set of citizens' groups, led by Central New York Fair Business Association ("CNYFBA"), argued that the Oneida were neither recognized nor under federal jurisdiction in 1934.<sup>361</sup> CNYFBA made a number of assertions: (1) the Oneida were under state, and not, federal jurisdiction; (2) any remaining federal jurisdiction ended with the Removal Act and the Treaty of Buffalo Creek in the 1830s; (3) the United States' land claim litigation was on behalf of individual Indians, and not the Tribe; and (4) the IRA vote was not conclusive as to the Oneida's federal jurisdictional status in 1934.<sup>362</sup> Applying *Chevron* deference—due to ambiguity in the phrase “under federal jurisdiction”—the district court rejected the plaintiffs' arguments.<sup>363</sup> Relying on the Treaty of Canandaigua, the court concluded the Oneida were under federal jurisdiction.<sup>364</sup> The court noted it was

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359. *Id.*

360. *Id.* at 34.

361. Central N.Y. Fair Bus. Ass'n v. Jewell, No. 08-660, 2015 WL 1400384 (N.D.N.Y. 2015), *reconsideration denied*, 2015 WL 6694117 (N.D.N.Y. 2015), *aff'd* 673 F. App'x 13 (2d Cir. 2016). Another citizens' group plaintiff in this lawsuit was Citizens Equal Rights Alliance ("CERA"), whose website declares that “Federal Indian Policy is unaccountable, destructive, racist, and unconstitutional. It is, therefore CERF and CERA's mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States.” Citizens Equal Rights Alliance Website, <http://citizensalliance.org/>. Their website links to an article declaring that Obama's Indian law policy, included fee-to-trust, threatened all Americans, by “subverting our constitutional order and successfully transferring vast land holdings and natural resources to corrupt, federally controlled tribal governments.” Elaine Willman, *Warpath: Obama's Indian Policy Threatens All Americans, Both Tribal and Non-tribal Citizens*, THE NEW AMERICAN (Aug. 31, 2016), <https://www.thenewamerican.com/usnews/constitution/item/23964-warpath-obama-s-indian-policy-threatens-all-americans-both-tribal-and-non-tribal-citizens>.

362. Central N.Y. Fair Bus. Ass'n, 2015 WL 1400384.

363. *Id.* at \*7.

364. *Id.* at \*8.



bound by Second Circuit precedent, which had held that the Oneida reservation was not disestablished by the Treaty of Buffalo Creek, the reservation remained intact, and that the affirmative land claim litigation had been brought on behalf of the Tribe.<sup>365</sup> Additionally, the court affirmed that Interior's interpretation that the IRA places no time limit upon recognition was reasonable, and the Oneida are federally recognized.<sup>366</sup>

CNYBA appealed the district court's decision to the Second Circuit, which affirmed.<sup>367</sup> However, CNYFBA did not appeal on the *Carcieri* issue, but instead focused on if the Oneida reservation had been disestablished, as well as a constitutional claim.<sup>368</sup> The Supreme Court denied CNYFBA's petition for certiorari.<sup>369</sup>

Another set of plaintiffs, led by citizens' group Upstate Citizens for Equality ("UCE"), argued that the Oneidas were under state jurisdiction with a state reservation.<sup>370</sup> Additionally, UCE, like CNYFBA, challenged the Oneida's status as a federally recognized tribe.<sup>371</sup> The district court rejected these arguments, noting that it was bound by Second Circuit precedent.<sup>372</sup> The court declined to disturb Interior's determination that the Oneida are a federally recognized tribe.<sup>373</sup> UCE appealed the

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365. *Id.* at \*9 (citing *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003)).

366. *Id.* at \*11. The two towns did not brief the *Carcieri* issue on summary judgment, despite having raised it in their complaint. *Town of Verona v. Jewell*, No. 08-647, 2015 WL 1400291 at \*5 (N.D.N.Y. Mar. 26, 2015). The court therefore concluded that they had not met their burden, and granted the United States' motion for summary judgment on the towns' *Carcieri* claims in their complaint. *Id.* The towns appealed to the Second Circuit, but did not raise a *Carcieri* argument. *Upstate Citizens for Equality, Inc. v. U.S.*, 841 F.3d 556, 564 at n. 9 (2d. Cir. 2016), *cert. denied* \_\_ S.Ct. \_\_ (2017).

367. *Central N.Y. Fair Bus. Ass'n v. Jewell*, 673 F. App'x 63 (2d. Cir. 2016).

368. *Id.*

369. *Cent. N.Y. Fair Bus. Ass'n v. Zinke*, 137 S. Ct. 2134 (2017).

370. *Upstate Citizens for Equality, Inc. v. Jewell*, No. 08-0633, 2015 WL 1399366 at \*5 (N.D.N.Y. Mar. 26, 2015). UCE has been cited as an example of an anti-Indian hate group for its "multifaceted attempts to reduce Indigenous political power while promoting racial stereotypes." *See Smith, supra* note 306.

371. *Upstate Citizens for Equality, Inc.*, 2015 WL 1399366 at \*5.

372. *Id.* at \*5-6.

373. *Id.* at \*1, \*6.

district court's decision to the Second Circuit, but did not raise *Carcieri*. Instead, UCE challenged the constitutionality of IRA Section 5 and the applicability of the IRA to the Oneidas.<sup>374</sup> The Second Circuit rejected these arguments, and ultimately, the Supreme Court denied UCE's petition for certiorari.<sup>375</sup>

#### 4. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan*

As previously noted in Section II(a)(ii), in 2012, the Supreme Court held that the QTA does not bar APA challenges to a fee-to-trust decision once the land is in trust, but the challenge cannot be brought by plaintiffs seeking to quiet title themselves.<sup>376</sup> The Supreme Court's decision allowed David Patchak's *Carcieri*-based challenge to Interior's decision to acquire trust land for the Gun Lake Band to proceed as a "garden-variety APA claim."<sup>377</sup> The Court remanded the case for further proceedings.<sup>378</sup>

While the case was pending before the district court on remand, Interior determined that the Gun Lake Band was under federal jurisdiction in 1934 for purposes of a different fee-to-trust acquisition.<sup>379</sup> Applying its two-part *Carcieri* framework, Interior determined that the historical record, which included numerous treaties between the United States and the Band; Interior's provision of benefits to the Band; and federal efforts to remove the Band from Michigan, "reflect[ed] a course of dealings between the United States and the Gun Lake Band beginning in 1795 and . . . there is sufficient subsequent evidence that the Tribe remained under

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374. *Upstate Citizens for Equality, Inc.*, 841 F.3d at 577.

375. *Upstate Citizens for Equality, Inc. v. U.S.*, \_\_ S.Ct.\_\_, 199 L. Ed. 2d 372, 2017 WL 5660979 (2017). Interestingly, Justice Thomas dissented from the Supreme Court's denial of certiorari, arguing that, in his view, the Indian Commerce Clause did not give Congress power to "authorize the taking of land into trust under the IRA." *Id.* at \*2 (Thomas, J., dissenting).

376. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 217 (2012).

377. *Id.* at 220-21.

378. *Id.* at 228.

379. *Patchak v. Jewell*, 109 F. Supp. 3d 152, 158 (D.D.C. 2015).

federal jurisdiction through the passage of the IRA in 1934.<sup>380</sup> Patchak challenged Interior's determination and argued that Interior's fee-to-trust decisions were not entitled to *Chevron* deference because the IRA was unambiguous and Interior's two-part *Carcieri* framework was set forth in an informal, internal memorandum.<sup>381</sup> Patchak also challenged Interior's application of the two-part framework to Gun Lake, noting that Gun Lake was not federally recognized until it completed the federal acknowledgment process in 1999, years after the IRA was enacted.<sup>382</sup>

However, the merits of Interior's *Carcieri* decision were never decided in court because in September 2014 Congress enacted the Gun Lake Trust Land Reaffirmation Act.<sup>383</sup> The Act reaffirmed Interior's decision to acquire land in trust for the Band and ordered the dismissal of Patchak's case.<sup>384</sup> Although Patchak challenged the constitutionality of the Act, arguing it violated separation of powers, the First Amendment right to petition, due process, and the bill of attainder clause of the U.S. Constitution, the district court upheld the Act and dismissed Patchak's lawsuit.<sup>385</sup> The district court never reached the question of whether the Gun Lake Band was under federal jurisdiction in 1934.<sup>386</sup> The D.C. Circuit Court of Appeals affirmed the district court.<sup>387</sup> On February 27, 2018, in a decision by Justice Thomas, the Supreme Court upheld the constitutionality of the Act, concluding that the Act was "well within" congressional authority to strip federal courts of jurisdiction.<sup>388</sup>

Patchak's *Carcieri* arguments and constitutional claims bear noting because they track those of other tribal opponents, and these arguments are likely to reappear in challenges to other fee-to-trust decisions or tribe specific legislation.

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380. Memorandum of Points & Authorities in Support of the U.S.'s Opposition to Plaintiff's Motion for Summary Judgment at 28, *id.* (No. 08-1331).

381. Plaintiff's Consolidated Reply to Defendants' and Intervenor-Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 7, 10, *id.* In addition, Patchak described the two-part framework as "limitless," accusing Interior of rendering the term "under Federal jurisdiction" "meaningless." *Id.* at 11

382. *Id.* at 18.

383. Gun Lake Act, 128 Stat. 1913.

384. *Id.*

385. *Patchak*, 109 F. Supp. 3d at 165.

386. *Id.* at 158-59, 165.

387. *Patchak v. Jewell*, 828 F.3d 995 (D.C. Cir. 2016).

388. *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018).

### 5. *Northfork Rancheria of Mono Indians of California*

In litigation involving trust acquisitions for Cowlitz, Ione, Oneida, and the Gun Lake Band, the plaintiffs challenged the Department's two-part *Cariceri* framework. However, another central component of the *Cariceri* M-Opinion was the memorialization of the Department's bright-line test, which states that the holding of a Section 18 vote by a tribe on whether to accept or reject the IRA is dispositive of whether a tribe was under federal jurisdiction in 1934. In *Stand Up for California! v. U.S. Department of the Interior*, this bright-line test was challenged by a citizens' group opposed to gaming, a tribe operating a competing casino, and others seeking to overturn a fee-to-trust decision for the Northfork Rancheria of Mono Indians ("North Fork" or "North Fork Rancheria").<sup>389</sup> In *Stand Up!*, the plaintiffs objected to the Department's decision to acquire in trust for North Fork a 305 acre parcel of land in Madera County, California, located 38 miles from the North Fork Rancheria.

*Stand Up!*'s complaint and briefs focused on the perceived evils of gaming and an allegedly greedy, fraudulent tribe.<sup>390</sup> However, the

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389. 204 F. Supp. 3d 212, 229 (D.D.C. 2016). Prior to the fee-to-trust decision, Interior had issued a two-part determination under IGRA, finding that the proposed off-reservation casino on was in the best interest of the North Fork Rancheria and would not be detrimental to the surrounding community. *Secretarial Determination Pursuant to the IGRA for the 305.49-Acre Madera Site in Madera County, California, for the North Fork Rancheria of Mono Indians*, Rec. of Decision (BIA Sept. 1, 2011) (on file with the Public Land & Resources Law Review). The Governor of California concurred in the Department's determination. *Trust Acquisition of the 305.49-Madera site in Madera County, Cal., for the North Fork Rancheria of Mono Indians*, Rec. of Decision 1 (BIA Nov. 2012), <http://www.northforkeis.com/documents/rod/ROD.pdf> [hereinafter *North Fork IRA ROD*].

390. See, e.g. Second Amended Complaint for Declaratory and Injunctive Relief ¶¶ 1, 5, 26, 28, *Stand Up for California! v. U.S. Dep't of Interior*, 71 F.Supp.3d 109 (D.D.C. 2014) (Nos. 12-2039 & 12-2071) (complaining about the alleged negative impacts of gaming, and that the Tribe already has trust land but is engaging in "reservation shopping" to build a mega-casino far away from its reservation); Plaintiffs' Memorandum of Points & Authorities in Support of Summary Judgment at 3, 11–17, *Stand Up for California! v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016), *aff'd sub nom. Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177 (D.C. Cir. 2018) (Nos. 12-2039 & 12-2071) (arguing that there was no link between the Indians for whom Interior acquired land for in 1916 and for whom the

history of the North Fork Rancheria, as well its current circumstances, tell the opposite story. Interior had originally set aside approximately 80 acres of “absolutely worthless” land for North Fork in 1916, an area that became known as the North Fork Rancheria.<sup>391</sup> In June 1935, the Secretary held a Section 18 vote, in which a majority of the adult Indians residing on the Rancheria voted against the application of the IRA, as reflected in the Haas List.<sup>392</sup> In 1958, as part of the shift in federal Indian policy towards termination, Congress enacted the California Rancheria Act, which authorized the Secretary to “terminat[e] . . . the Federal trust relationship” with several California tribes, including the North Fork Rancheria, and to distribute the Tribe’s lands to individual ownership.<sup>393</sup> In 1966, the Secretary published notice in the Federal Register that title to the Rancheria had passed to an individual Indian.<sup>394</sup> In 1983, following litigation brought by 17 Rancherias, including North Fork, the Secretary agreed to recognize North Fork and restore the Rancheria to trust status.<sup>395</sup> Interior subsequently acquired 61.5 acres of land in trust for North Fork for housing, government, and conservation purposes, but the land was unusable for economic development purposes.<sup>396</sup>

In agreeing to accept the 305-acre Madera site in trust for North Fork, the Secretary determined the acquisition would “promote the long-term economic self-sufficiency, self-determination, and self-governance of the Tribe.”<sup>397</sup> The Secretary also noted that North Fork had entered into a memorandum of understanding with the County to address impacts of

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Secretary held an election and the North Fork Rancheria today); *Stand Up Plaintiffs’ Final Opening Brief* at 24, *Stand Up for California! v. U.S. Dep’t of Interior*, 879 F.3d 1177 (D.C. Cir. 2018) *cert. denied sub nom.* *Stand Up for California v. U.S. Dep’t of Interior*, 139 S. Ct. 786 (2019) (Nos. 16-5327 & 16-5328) (arguing that there is no evidence of continuous tribal existence).

391. *Stand Up for California!*, 204 F. Supp. 3d at 212, 229.

392. Haas List, *supra* note 184, at 15.

393. Act of Aug. 18, 1958, Pub. L. No. 85-671, § 9, 72 Stat. 619 (1958).

394. Certain Rancherias in California: Notice of Termination of Federal Supervision Over Property and Individual Members, 31 Fed. Reg. 2911 (Feb. 18, 1966).

395. Restoration of Federal Status to 17 California Rancherias, 49 Fed. Reg. 24,084 (June 11, 1984).

396. *North Fork IRA ROD*, *supra* note 389, at 4-5.

397. *Id.* at summary, 1.

the trust acquisition.<sup>398</sup> Regarding *Carcieri*, in a short analysis, the Department determined that the “calling of a Section 18 election at the Tribe’s Reservation [on June 10, 1935] conclusively establishes that the Tribe was under Federal jurisdiction for *Carcieri* purposes.”<sup>399</sup> The Department also reasoned that North Fork’s vote against the IRA did not limit its ability to have land acquired in trust under the IRA, based on 1983 legislation amending the IRA to provide that Section 5 “applies to all tribes notwithstanding Section 18 of such Act.”<sup>400</sup> Interior did not provide any other reasoning for the Department’s statutory authority to acquire land in trust for North Fork Rancheria.

Plaintiff citizens’ group and the Picayune Rancheria of the Chukchansi Indians, who operate a competing casino, challenged the North Fork decision in federal district court on *Carcieri* and other grounds.<sup>401</sup> With respect to *Carcieri*, the plaintiffs argued that a Section 18 election “cannot, on its own, be conclusive evidence that a tribe was under federal jurisdiction.”<sup>402</sup> Plaintiffs asserted that the Indians who voted were not necessarily members of one particular “tribe.”<sup>403</sup> Plaintiffs then went one step further and argued that the present-day North Fork Rancheria is not the same tribe for whom Interior acquired the Rancheria in 1916 or for whom the Secretary held a vote in 1935.<sup>404</sup> Plaintiffs accused the Secretary of fabricating “a narrative of recognition, termination, and restoration.”<sup>405</sup>

On September 6, 2016, the district court upheld Interior’s decision.<sup>406</sup> The court held that a Section 18 election “can, by itself, conclusively establish the existence of a tribe under federal jurisdiction” because under the definitions section of the IRA, “‘Indians residing on one reservation’ constitute a ‘tribe’” and Section 18 elections were held for

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398. *Id.* at 56.

399. *Id.* at 55.

400. *Id.* (citing the Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2515 (1983), codified as amended at 25 U.S.C. § 2202 (2018)).

401. *Stand Up for California!*, 204 F. Supp. 3d 212 (D.D.C. 2016) (also addressing claims based in IGRA, the Clean Air Act, and NEPA).

402. *Id.* at 281.

403. *Id.* at 282.

404. *Id.* at 283.

405. Plaintiffs’ Memorandum of Points & Authorities in Support of Summary Judgment at 11–12, *Id.* (Nos. 12-2039 & 12-2071).

406. *Stand Up for California!*, 204 F. Supp. 3d at 323.

Indians at reservations.<sup>407</sup> In other words, a Section 18 vote of the adult Indians on a reservation was a vote of a tribe. The court also held that the IRA “does not require ‘unified’ tribal affiliation,” and chided the plaintiffs for conflating recognition and federal jurisdiction.<sup>408</sup> The court concluded that North Fork’s jurisdictional status in 1934 was confirmed by Interior’s purchase of the Rancheria in 1916.<sup>409</sup> Finally, the court rejected plaintiffs’ challenge to North Fork’s “continuing Tribal existence” noting that any such claims were untimely and that, in any event, the Secretary “was not required to make factual findings regarding the North Fork Tribe’s continuous existence.”<sup>410</sup>

Plaintiffs appealed to the Court of Appeals for the D.C. Circuit, which affirmed.<sup>411</sup> Plaintiffs again argued that participants in the 1934 election did not belong to any one tribe, and that Interior had not demonstrated a connection between the Indians who voted in 1935 and the North Fork Rancheria today.<sup>412</sup> The D.C. Circuit rejected plaintiffs’ argument, citing the definition of “tribe” as including “Indians residing on one reservation,” and concluding that “a section 18 election on a reservation establishes that the Indian residents qualify as a tribe subject to federal jurisdiction.”<sup>413</sup> With respect to plaintiffs’ argument challenging North Fork’s continued tribal existence, the D.C. Circuit exclaimed “Enough is enough!” and affirmed the Department’s reliance on the “unremarkable assumption that a political entity, even as its membership evolves over time, retains its essential character.”<sup>414</sup> Plaintiffs, refusing to take the D.C. Circuit’s words to heart, filed a petition for rehearing en banc, which was denied. Plaintiffs then filed a petition for certiorari with the Supreme Court.<sup>415</sup> In its petition, plaintiffs asserted, as it did below, that a Section 18 vote was held only for a reservation, and not for a

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407. *Id.* at 283, 284-286.

408. *Id.* at 283, 288.

409. *Id.* at 283.

410. *Id.* at 291-292, 301-302.

411. *Stand Up for California! v. U.S. Dep’t of Interior*, 879 F.3d 1177 (D.C. Cir. 2018), *rehearing en banc denied* (Apr. 20, 2018).

412. *Id.* at 1182.

413. *Id.*

414. *Id.* at 1186. The D.C. Circuit also rejected plaintiffs’ IGRA and Clean Air Act arguments. *Id.* at 1190-1191.

415. *Petition for Writ of Certiorari, Stand Up for California! v. U.S. Dep’t. of Interior*, 139 S. Ct. 786 (2019) (No. 18-61).

particular tribe.<sup>416</sup> On January 4, 2019, the Supreme Court denied plaintiff's certiorari petition in *Stand Up!*.<sup>417</sup>

#### 6. *Enterprise Rancheria of Maidu Indians of California*

A similar challenge to the Secretary's reliance on a Section 18 vote as dispositive evidence separately arose in the Ninth Circuit. In November 2012, Interior decided to acquire 40 acres of trust land in Yuba County, California, for gaming purposes for the Enterprise Rancheria of Maidu Indians of California ("Enterprise").<sup>418</sup> The decision section discussing *Carcieri* mirrored Interior's North Fork decision by relying on the Section 18 vote as dispositive evidence of Enterprise's federal jurisdictional status.<sup>419</sup> In addition, Interior summarized the history of Enterprise. Enterprise had limited land holdings—40 acres—that did not provide a usable land base for economic development.<sup>420</sup> Interior found that Enterprise demonstrated a need for land "to better exercise its sovereign responsibility to provide economic development to its tribal citizens."<sup>421</sup>

Citizens for a Better Way, other citizens' groups, individual citizens,<sup>422</sup> and two other tribes who operate competing casinos, challenged Interior's fee-to-trust decision in federal district court.<sup>423</sup> The citizens' groups argued that the Secretary's authority to acquire trust land under the IRA was limited to tribes who were recognized in 1934, which

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416. *Id.* at 13. *Stand Up!* also argued that the Secretary erred in concluding that the casino would not be detrimental to the surrounding community. *Id.* at 9.

417. *Stand Up for California! v. U.S. Dep't of Interior*, 139 S. Ct. 786 (2019).

418. *Trust Acquisition of the 40-acre Yuba County Site in Yuba County, California, for the Enterprise Rancheria of Maidu Indians of California*, REC. OF DECISION 1 (BIA Nov. 2012), <https://docs.google.com/file/d/edit>.

419. *Id.* at 43–44 (citing Haas List, *supra* note 184, at 15).

420. *Id.* at 44.

421. *Id.*

422. These plaintiffs were represented by the same attorneys who represent the citizens' groups in *Grand Ronde* and *Stand Up for California!*.

423. *Citizens for a Better Way v. U.S. Dep't of Interior*, No. 12-3021, 2015 WL 5648925 (E.D. Cal. Sept. 24, 2015). In addition to *Carcieri*, plaintiffs raised arguments based on the IRA, NEPA, and IGRA.



they alleged Enterprise was not.<sup>424</sup> The groups also argued that Section 18 votes were held by reservation, not by tribe, and thus a vote among Indians residing on the Enterprise Rancheria in 1935 did not establish that Enterprise, as a tribe, was under federal jurisdiction in 1934.<sup>425</sup> In an unpublished decision, the district court rejected the citizens' groups' arguments and upheld Interior's fee-to-trust decision on all grounds.<sup>426</sup> Regarding *Carcieri*, the court "found no reason to stray" from Interior's practice of determining federal jurisdiction, including the reliance on the Section 18 vote as dispositive evidence.<sup>427</sup>

The citizens' groups as well as one tribe appealed to the Court of Appeals for the Ninth Circuit.<sup>428</sup> Once again, the citizens' groups argued that votes were held by reservation, not by tribe.<sup>429</sup> The Ninth Circuit rejected this argument, noting that it ignored the "expansive definition of 'tribe' contained in the IRA," which included "Indians residing on one reservation."<sup>430</sup> The Ninth Circuit held that the Section 18 vote established that Enterprise was under federal jurisdiction in 1934, noting that this holding was consistent with the D.C. Circuit's decision in *Stand Up!*.<sup>431</sup> The Ninth Circuit also concluded that Interior's acquisition of the Rancheria for Enterprise in 1915 was additional evidence that Enterprise was under federal jurisdiction in 1934.<sup>432</sup> The Ninth Circuit affirmed the district court's decision upholding the acquisition.<sup>433</sup>

### 7. *United Keetoowah Band of Cherokee Indians in Oklahoma*

As discussed above, in separate decisions dated 2011 and 2012, Interior agreed to accept land in trust for the corporate arm of the UKB for gaming and community purposes, respectively. In both decisions, Interior

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424. Plaintiffs' Memorandum of Support of Motion for Summary Judgment at 11, *Id.* (No. 12-3021).

425. *Id.* at 7.

426. *Citizens for a Better Way*, 2015 WL 5648925 at \*24.

427. *Id.* at \*22.

428. *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 594 (9th Cir. 2018).

429. *Id.* at 595.

430. *Id.* (citing 25 U.S.C. § 5129).

431. *Id.*

432. *Id.* at 594.

433. *Id.* at 608.

concluded that *Carcieri* did not limit the Secretary's authority to acquire land in trust for the UKB because the OIWA extended the benefits of the IRA, including land-into-trust, to OIWA tribes.<sup>434</sup> The Cherokee Nation separately challenged both decisions in federal court.<sup>435</sup> In May 2017, the district court ruled in favor of the Cherokee Nation in the non-gaming parcel litigation, remanding the decision to Interior to obtain the Cherokee Nation's consent and for further consideration of *Carcieri* and potential jurisdictional conflicts and administrative burdens the acquisition would place on the BIA.<sup>436</sup> Regarding *Carcieri*, the district court found that the OIWA incorporated the IRA as a whole, and thus UKB must demonstrate that it satisfied a definition of "Indian" in the IRA.<sup>437</sup> As explained by the court, "[t]o allow a corporation formed under the OIWA to enjoy a portion of the IRA's provisions without regard to its other provisions and definitions would be to provide it more rights and privileges than the IRA provides."<sup>438</sup> The United States and UKB appealed to the Tenth Circuit, where the case remains pending.<sup>439</sup> In its appeal, the United States argued that incorporated Oklahoma tribes "need not meet the IRA's separate definition of 'Indian' because . . . the OIWA extended the IRA's 'rights or privileges' to 'the incorporated group' of '[a]ny recognized tribe or band of Indians residing in Oklahoma.'"<sup>440</sup> The district court has yet to rule on the separate gaming decision.

#### 8. Mashpee Wampanoag Tribe

As discussed above, in September 2015, Interior decided to accept two parcels of land in trust on behalf of the Mashpee Tribe for gaming and

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434. See *supra* Section III(b)(iii)(a).

435. *The Cherokee Nation v. Jewell*, No. 12-493, 2013 WL 5329787 (N.D. Okla. 2013); *The Cherokee Nation v. Jewell*, No. 14-428, 2017 WL 2352011 (E.D. Okla. 2017).

436. *The Cherokee Nation v. Jewell*, 2017 WL 2352011 at \*1, \*7.

437. *Id.* at \*7.

438. *Id.* at \*6.

439. *The Cherokee Nation v. Zinke*, Nos. 17-7042 & 17-7044, 2017 WL 2352011 (10th Cir. 2017).

440. Opening Brief for Federal Appellants at 18, *id.* (10th Cir. Dec. 1, 2017) (Nos. 17-7042 & 17-7044).

other purposes.<sup>441</sup> Interior declined to make a determination as to whether Mashpee was under federal jurisdiction in 1934, instead relying on the second definition of “Indian” in the IRA.<sup>442</sup> That definition includes: “all person who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.”<sup>443</sup> Interior found that Mashpee satisfied that definition.<sup>444</sup> As part of its determination, Interior concluded that the reference to “such members” in the second determination was ambiguous as to whether it incorporated the entire first definition, “all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction,” or whether it only incorporated a portion of the definition, “members of any recognized Indian tribe.”<sup>445</sup> Considering the broad remedial purposes of the IRA, its legislative history, and other rules of statutory construction, Interior determined the second definition only incorporated a portion of the first definition, and did not require Mashpee to demonstrate it was under federal jurisdiction in 1934 to satisfy the second definition.<sup>446</sup>

Plaintiffs David Littlefield and other residents of the Town of Taunton, opposed to the Mashpee’s planned development, challenged Interior’s decision in federal court, arguing, *inter alia*, that the Mashpee did not meet the second definition of “Indian” in the IRA, because, in their view, it plainly incorporated the first definition.<sup>447</sup> They argued that “such members” refers to the entirety of the first definition, and thus, in addition to meeting the second definition’s residency requirements, Mashpee needed to show that it was under federal jurisdiction in 1934.<sup>448</sup> The court agreed with plaintiffs, finding that the second definition unambiguously

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441. 2015 Mashpee ROD, *supra* note 274. See also *supra* Section II(b)(iii)(c).

442. *Id.* at 79–80.

443. 25 U.S.C. § 5129.

444. 2015 Mashpee ROD, *supra* note 274 at 79. See also *supra* Section II(b)(iii)(c).

445. *Id.* at 81.

446. *Id.* at 94–95.

447. Littlefield v. U.S. Dep’t of Interior, 199 F. Supp. 3d 391, 396 (D. Mass. 2016). In press interviews, plaintiffs made it clear that they did not oppose casinos generally, or even a casino in their town, but rather opposed a tribal casino. See, e.g., Sean P. Murphy, *Taunton casino’s foes will press on*, BOSTON GLOBE (June 28, 2016).

448. Littlefield, 199 F. Supp. 3d at 396.

incorporated the entire first definition, and no deference was due to Interior's interpretation under *Chevron*.<sup>449</sup> The court also suggested that Mashpee was not under federal jurisdiction in 1934— despite the fact that Interior had never decided the question—apparently on the basis that Mashpee was not formally recognized until 2007.<sup>450</sup> At Interior's request, the court subsequently issued an order clarifying that it did not decide the jurisdictional issue, and remanded the matter to Interior for a determination on whether the Mashpee were under federal jurisdiction in 1934.<sup>451</sup>

Following the district court's decision, Mashpee intervened as a defendant<sup>452</sup> and appealed to the First Circuit Court of Appeals.<sup>453</sup> Interior filed a notice of appeal, which it later dismissed.<sup>454</sup> The First Circuit stayed Mashpee's appeal pending Interior's decision on remand, which, as discussed in Section V(c), was issued on September 7, 2018. The Tribe has since filed a lawsuit challenging Interior's decision on remand in federal district court in the District of Columbia.<sup>455</sup>

#### 9. *Interior Board of Indian Appeals*

Several IBIA decisions have addressed *Carcieri*. The IBIA reviews decisions of BIA Regional Directors to acquire land in trust, among other decisions. In several cases, the IBIA has upheld BIA's reliance on a Section 18 vote as dispositive evidence that a tribe was under federal jurisdiction. The IBIA first addressed the issue in *Shawano County v. Midwest Area Director*, in which the County challenged a fee-to-trust decision for the Stockbridge Munsee Community, Wisconsin.<sup>456</sup> The

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449. *Id.* at 400.

450. *Id.*

451. *Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016).

452. *Littlefield v. U.S. Dep't of Interior*, 318 F.R.D. 558 (D. Mass. Sept. 23, 2016).

453. *Littlefield v. Mashpee Wampanoag Indian Tribe*, No. 16-2484 (1st Cir.).

454. *Littlefield v. U.S. Dep't of the Interior*, 16-2481, 2017 WL 10238203, at \*1 (1st Cir. May 8, 2017).

455. *Mashpee Wampanoag Tribe v. Zinke*, No. 18-2242 (D.D.C. Sept. 27, 2018).

456. *Shawano Cty. v. Midwest Reg'l Dir.*, 53 I.B.I.A. 62, 75–76 (2011).

IBIA held that the “Secretary’s act of calling and holding this [Section 18 election] for the Tribe informs us that the Tribe was deemed to be ‘under Federal jurisdiction’ in 1934.”<sup>457</sup> In addition, citing a Supreme Court decision, the IBIA concluded that even if, at times, the state had exercised jurisdiction, and “Federal supervision had not been continuous, that did not destroy the Federal government’s jurisdiction over the [t]ribe.”<sup>458</sup>

The next year, the IBIA again concluded that a Section 18 vote was conclusive of the *Carcieri* question, upholding Interior’s authority to acquire trust land for the Oneida Nation on the basis of a Section 18 vote.<sup>459</sup> The IBIA reasoned that Interior’s holding of a Section 18 vote “necessarily was premised upon a determination by the Executive Branch that the individuals allowed to vote were ‘adult Indians’ within the meaning of the [25 U.S.C. § 5129].”<sup>460</sup> Although not necessary to its holding, the IBIA noted that other evidence in the historical record further demonstrated federal jurisdiction over the Oneidas, including lands already held in trust for the Tribe and individual Indians, and the “inclusion in the Indian population census and assignment of the Tribe to the jurisdiction of a BIA agency.”<sup>461</sup>

Likewise, in a separate decision concerning the Saint Regis Mohawk Tribe, the IBIA held that the Secretary’s calling of a Section 18 vote was dispositive evidence that the Tribe was under federal jurisdiction.<sup>462</sup> The IBIA noted in that case that the set aside of a reservation for the Tribe, through a treaty, also indicated federal jurisdiction.<sup>463</sup> Moreover, the IBIA cited the United States bringing affirmative litigation on behalf of the Tribe in 1938 as additional evidence of federal jurisdiction.<sup>464</sup> The IBIA also relied on the Secretary’s call for a vote on whether to accept or reject the IRA in cases affirming trust

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457. *Id.* at 72.

458. *Id.* at 74 (citing *U.S. v. John*, 437 U.S. 634, 650 n.20, 652–653 (1978)).

459. *Vill. of Hobart v. Midwest Reg’l Dir.*, 57 I.B.I.A. 4, 22–23 (2013).

460. *Id.* at 23.

461. *Id.* at 24.

462. *N.Y. v. Acting E. Reg’l Dir.*, 58 I.B.I.A. 323, 332 (2014).

463. *Id.* at 333.

464. *Id.*

acquisitions for the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California<sup>465</sup> and the Wyandotte Nation.<sup>466</sup>

Additionally, the IBIA has upheld BIA *Carcieri* determinations for tribes lacking a Section 18 vote but where other types of federal actions demonstrated federal jurisdiction. For example, in *Mille Lacs County v. Acting Midwest Regional Director*, the IBIA upheld a BIA decision to acquire land in trust for the Mille Lacs Band of Ojibwe Indians of the Minnesota Chippewa Tribe (“Mille Lacs Band”).<sup>467</sup> The IBIA acknowledged that while there was nothing in the record demonstrating the occurrence of a Section 18 vote, “the absence of such evidence does not compel a finding that the tribe was not under Federal jurisdiction in 1934.”<sup>468</sup> To establish that the Mille Lacs Band was under federal jurisdiction in 1934, the IBIA relied on the “long history of Federal treaties, statutes, congressional appropriations, and executive agency actions undertaken with or on behalf of the Mille Lacs Band prior to and contemporaneous with the enactment of the IRA.”<sup>469</sup> For example, the Mille Lacs Band entered into seven treaties with the United States between 1825 and 1867, and Congress enacted 12 statutes relating to the tribe between 1884 and 1933.<sup>470</sup> The IBIA rejected Mille Lac County’s argument that the Mille Lacs Band today is a “new and distinct entity from the Mille Lacs band which existed historically.”<sup>471</sup>

The IBIA also relied on treaty rights as compelling evidence of federal jurisdiction over the Grand Traverse Band of Ottawa and Chippewa Indians, Michigan (“Grand Traverse Band”).<sup>472</sup> In *Grand Traverse County Board of Commissioners v. Acting Midwest Regional Director*, other acts, in addition to a treaty, similarly showed federal jurisdiction.<sup>473</sup> Specifically, upon an authorization by Congress, the Grand

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465. Rodney R. Starkey v. Pac. Reg’l Dir., 63 I.B.I.A. 254, 264 (2016).

466. State of Kansas v. Acting E. Okla. Reg’l Dir., 62 I.B.I.A. 225, 236 (2016).

467. Mille Lacs Cty. v. Acting Midwest Reg’l Dir., 62 I.B.I.A. 130 (2016).

468. *Id.* at 142.

469. *Id.* at 140.

470. *Id.* at 141.

471. *Id.* at 143.

472. Grand Traverse Cty. Bd. of Comm’rs v. Acting Midwest Reg’l Dir., 61 I.B.I.A. 273 (2015).

473. *Id.*

Traverse Band filed a claim with the Court of Claims Commission resulting in a judgment being awarded and the BIA compiled a roll to distribute the judgment.<sup>474</sup> However, the County argued that the Secretary terminated federal recognition of the Grand Traverse Band in 1872 and that correspondence around the time of the IRA questioned the tribe's status.<sup>475</sup> The County further noted that the Department had not extended IRA benefits to the Grand Traverse Band.<sup>476</sup> The IBIA rejected that this evidence was dispositive, citing Justice Breyer's comment in *Carcieri* that "a tribe may have been 'under federal jurisdiction' in 1934 even though the Federal government did not believe so at the time."<sup>477</sup> The IBIA also explained: "in 1934, the Tribe undoubtedly held a reservation of Federally protected fishing rights and other associated property rights, and those legal rights could be neither diminished nor terminated by the Secretary's improper *de facto* 'termination' of the Federal government's relationship with the Tribe, based on his erroneous interpretation of the 1855 treaty."<sup>478</sup>

In several cases, the IBIA accepted requests by the Regional Director to have a fee-to-trust decision remanded to the Region to address *Carcieri*. In those cases, the Regional Director acknowledged that the decision had not considered *Carcieri*, and thus, the trust acquisition could not proceed.<sup>479</sup> In another case, the IBIA held that *Carcieri* did not limit the Secretary's authority to acquire land in trust under separate statutory authority found in a restoration act.<sup>480</sup>

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474. *Id.* at 279.

475. *Id.*

476. *Id.* at 279.

477. *Id.* at 281 (citing *Carcieri v. Salazar*, 555 U.S. 379, 397 (2009) (Breyer, J., concurring)).

478. *Id.* at 282.

479. *Cal. Coastal Comm'n v. Pac. Reg'l Dir.*, 51 I.B.I.A. 141 (2010) (trust acquisition for Big Lagoon Rancheria, California); *Miami-Dade Cty. v. Acting E. Reg'l Dir.*, 57 I.B.I.A. 192 (2013) (acquisition for the Miccosukee Tribe of Indians); *Pres. of Los Olivos v. Pac. Reg'l Dir.*, Nos. IBIA 05-050A & 05-05-1 (May 17, 2010) (order vacating decision in part and remanding in part) (acquisition for the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation).

480. *City of Bloomfield v. Acting Great Plains Reg'l Dir.*, 61 I.B.I.A. 296, 300 (2015) (affirming mandatory trust acquisition for the Ponca Tribe of Nebraska).

### 10. Summary

To date, courts and the IBIA have approved every single Interior determination that a particular tribe was under federal jurisdiction in 1934, satisfying the first definition of “Indian” in the IRA. Federal courts have also unanimously upheld the Department’s interpretation of “under federal jurisdiction” in 1934, concluding it was reasonable. Critically, courts have also recognized Interior’s unique and specialized expertise in determining whether a particular tribe was under federal jurisdiction in 1934.<sup>481</sup> In only two instances has a court struck down an Interior fee-to-trust decision based on *Carcieri*, Interior’s decisions in UKB and Mashpee. However, in both of those cases Interior did not determine whether the tribe was under federal jurisdiction in 1934—Interior relied on other authority instead.

Certain categories of claims have emerged over the last ten years of litigation. Several cases challenged the validity of Interior’s statutory interpretation of “under Federal jurisdiction” as embodied in its two-part framework.<sup>482</sup> These cases generally included claims that not only federal jurisdiction, but also formal federal *recognition*, is required in 1934.<sup>483</sup> Additionally, some litigants argued evidence that an IRA Section 18 election was held at the tribe’s reservation is not dispositive of 1934 jurisdiction.<sup>484</sup> Other cases challenged Interior’s application of its two-

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481. See, e.g., *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 407 (D.D.C. 2014) (noting that “the Secretary has exercised her expertise in Indian Affairs to construe ambiguous statutory language and in reconciling different approaches taken by different agencies as they exercise their responsibilities to Indian tribes”); *N.Y. v. Salazar*, No. 6:08-CV-00644, 2012 WL 4364452, at \*15 (N.D.N.Y. 2012) (“There is an institution specifically designed and coordinated to have expertise in the social, cultural, political, and legal history of the indigenous people of the United States. This institution is not the Court. It is the Bureau of Indian Affairs.”).

482. See, e.g., *Confederated Tribes of the Grand Ronde Cmty.*, 75 F. Supp. 3d 387; *Cty. of Amador v. Dep’t of Interior*, 872 F.3d 1012 (2017); *No Casino in Plymouth*, 136 F. Supp. 3d 1166 (2015).

483. See, e.g., *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016); *Central N.Y. Fair Bus. Ass’n v. Jewell*, No. 6:08-cv-0660 (N.D.N.Y. 2015).

484. See, e.g., *Stand Up for California! V. Dep’t of Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016); *Citizens for a Better Way v. Dep’t of Interior*, No. 2015 WL 5648925; *Shawano County*, 53 I.B.I.A. 62; *Village of Hobart*, 57 I.B.I.A. 4.



part framework to particular tribes.<sup>485</sup> Several cases involved claims that the tribe did not actually exist as a tribal entity in 1934, regardless of whether its individual members were under federal jurisdiction.<sup>486</sup> Similarly, some litigants argued that a modern tribe was not the same entity as the tribe that was allegedly under federal jurisdiction in 1934.<sup>487</sup> A few cases raised claims that the historical exercise of state jurisdiction ousted the existence of federal jurisdiction.<sup>488</sup> None of these categories of claims have been successful.

### B. Collateral Attacks on Interior Trust Decisions

Litigation spurred from the *Carcieri* decision has not been limited to direct attacks on the Department's land acquisition authority. Thus far, *Carcieri* has also reared its ugly head through collateral attacks on decades-old trust acquisitions, illustrating the dangerous scope creep of historically misinformed court precedent.<sup>489</sup> This section examines collateral *Carcieri* claims raised in cases related to IGRA—such as the duty to negotiate compacts in good faith, state causes of action for IGRA violations, and gaming eligibility of Indian lands—as well as in the context of tax liability for trust lands and the legality of state gaming license preferences.

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485. See, e.g., *Confederated Tribes of the Grand Ronde Cmty.*, 75 F. Supp. 3d 387; *Cty. of Amador*, 872 F.3d 1012; *Mille Lacs Cty.*, 62 I.B.I.A. 130; *Grand Traverse Cty. Bd. of Comm'rs*, 61 I.B.I.A. 273.

486. See, e.g., *Citizens for a Better Way*, 2015 WL 5648925; *Cty. of Amador*, 872 F.3d 1012; *Kansas*, 62 I.B.I.A. 236.

487. See, e.g., *Upstate Citizens for Equality, Inc.*, 841 F.3d 556; *Cty. of Amador*, 136 F. Supp. 3d 1193.

488. See, e.g., *Central N.Y. Fair Bus. Ass'n*, 2015 WL 14000384; *New York*, 58 I.B.I.A. 323; *Shawano Cty.*, 53 I.B.I.A. 62.

489. See, e.g., ROBERT A WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (discussing how Indian law decisions rooted in racial prejudices, stereotypes, and historical half-truths necessarily, and undesirably, expands its reach over time due to the principle of stare decisis).

### 1. Indian Gaming Regulatory Act

In litigation involving the Big Lagoon Rancheria in California (“Big Lagoon”), the State of California argued that IGRA imposed no duty to negotiate in good faith for a gaming compact when the underlying trust lands, on which gaming is intended, were acquired for a tribe that was allegedly not under federal jurisdiction in 1934.<sup>490</sup> Big Lagoon originally filed the litigation in 2009 after years of failed negotiations with California concerning the siting of and environmental specifications for Big Lagoon’s proposed casino.<sup>491</sup> California responded with a post hoc argument that it could not be compelled to negotiate in good faith because the lands did not qualify as “Indian lands” for purposes of triggering IGRA because the Department had allegedly acquired the land in trust for the tribe without proper authority, as defined by *Carcieri*.<sup>492</sup> Bear in mind that the land acquisition at issue occurred in 1994 and, at that time, the State had not challenged the Department’s authority under the IRA.<sup>493</sup> Nor had the State attempted to join the United States to the subsequent *Big Lagoon* litigation.<sup>494</sup>

Despite these facts, the Ninth Circuit originally held that the State could raise its *Carcieri*-related claim, regardless of the APA’s six-year statute of limitations, because the State’s interests in the trust acquisition were not invoked until Big Lagoon filed its IGRA lawsuit.<sup>495</sup> The Ninth Circuit then proceeded to rule on the merits, deciding after a cursory review of an incomplete record that Big Lagoon was not under federal jurisdiction in 1934; therefore, the Department lacked authority to acquire the trust land, and Big Lagoon had no right to compel negotiations to conduct gaming activities on that land.<sup>496</sup> Fortunately, the Ninth Circuit righted course upon rehearing en banc, where it tossed California’s *Carcieri*-based claim because the State failed to bring a timely APA claim

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490. See generally *Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015) (*en banc*) (2015 *Big Lagoon* Decision), reversing and remanding 741 F.3d 1032 (9th Cir. 2014) (2014 *Big Lagoon* Decision).

491. 2015 *Big Lagoon* Decision at 951–952.

492. *Id.* at 952.

493. *Id.*

494. *Id.* at 954.

495. 2014 *Big Lagoon* Decision at 1042–1043.

496. *Id.* at 1043–45.

against the United States to challenge the 1994 trust acquisition.<sup>497</sup> The Ninth Circuit also rejected an attempt by California to challenge BIA's recognition of Big Lagoon, concluding that such a challenge would be time-barred.<sup>498</sup>

While the Ninth Circuit considered California's collateral challenge in *Big Lagoon*, the Eleventh Circuit grappled with a similar challenge raised by the State of Alabama against the Poarch Band of Creeks ("Poarch" or "Poarch Band"). In *Alabama v. PCI Gaming Authority*, Alabama sued the tribal gaming authority and tribal officials for the alleged operation of Class III gaming activities.<sup>499</sup> As part of its claims, Alabama argued that Poarch Band's casinos were not located on "Indian lands" as required by IGRA.<sup>500</sup> Although the Department issued trust deeds for the lands in 1984, 1992, and 1995, Alabama argued that these acquisitions were invalid because the Poarch Band was not federally recognized until 1984, and therefore was not "under federal jurisdiction" in 1934 for purposes of *Carcieri*.<sup>501</sup>

The Eleventh Circuit wholeheartedly rejected Alabama's attempt to circumvent the APA. Noting the Supreme Court's *Patchak* language that a fee-to-trust challenge is a "garden-variety APA claim," the Eleventh Circuit found that Alabama "cannot raise . . . a collateral challenge to the Secretary's authority to take the lands at issue into trust" in litigation brought decades after the transfer of trust title and without the Secretary's involvement as a party.<sup>502</sup> Moreover, and in line with the *Big Lagoon* en banc decision, the Eleventh Circuit clarified that Alabama's APA action accrued at the time the agency decision was issued.<sup>503</sup> The Eleventh Circuit did, however, consider Alabama's argument that it qualified for an

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497. 2015 *Big Lagoon* Decision at 954. *Id.* at 954 ("Allowing California to attack collaterally the BIA's decision to take the eleven-acre parcel into trust outside the APA would constitute just the sort of end-run that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government.").

498. *Id.*

499. See *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278 (11th Cir. 2015), *aff'ing* 15 F. Supp. 3d 1161 (M.D. Ala. 2014).

500. *Id.* at 1290–1291.

501. *Id.* at 1290–1292.

502. *Id.* at 1291.

503. *Id.* at 1291–1292 ("[T]he statute begins to run when the agency issues the final action that gives rise to the claim").

exception to the APA's six-year statute of limitations, yet ultimately rejected this argument since there was no evidence that Alabama was unaware of the trust acquisitions at the time they were made.<sup>504</sup>

Big Lagoon is not the only tribe in the Ninth Circuit to contend with an improper collateral attack on its trust land under the auspices of a gaming challenge. A citizens' group challenged a decades old trust acquisition for the Jamul Indian Village of California ("JIV"). Jamul Action Committee ("JAC") brought a lawsuit against the National Indian Gaming Commission's purported issuance of an Indian lands determination under IGRA for the JIV on *Carcieri* grounds. JAC argued that because JIV was neither federally recognized nor under federal jurisdiction in 1934, JIV's reservation did not qualify as "Indian lands" under IGRA.<sup>505</sup> The district court dismissed JAC's complaint in part, concluding that JAC's challenge to the status of JIV's land was barred by the Ninth Circuit's decision in *Big Lagoon*.<sup>506</sup> JAC appealed the district court's decision, which was dismissed for lack of jurisdiction.<sup>507</sup> JAC then appealed a final judgment by the district court to the Ninth Circuit, and the case remains pending.<sup>508</sup>

## 2. Tax Liability

*Carcieri* also played a central role in a lawsuit between the Poarch Band and the Tax Assessor for Escambia County, Alabama, concerning

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504. *Id.* at 1292.

505. Complaint for Declaratory and Injunctive Relief ¶¶ 86–99, Jamul Action Comm. v. Chaudhuri, 2015 WL 1802813, (E.D.Cal. 2015) (No. 13-1920). JAC routinely issues "legal updates" challenging not only the Tribe's plans for economic development but also the existence of and status of the JIV. *See, e.g.*, JAC Legal Update (Aug. 17, 2016), <https://jacjamul.com/news/20160817.shtml> (arguing that JIV's Reservation is not held in trust, is not eligible for gaming, and that JIV was not properly recognized and does not possess sovereign immunity).

506. Jamul Action Comm. v. Chaudhuri, 200 F. Supp .3d 1042, 1051–1052 (E.D. Cal. 2016) (citing Jamul Action Comm. v. Chaudhuri, 651 Fed. Appx. 689, 690 (9th Cir. 2016)).

507. Jamul Action Comm. v. Chaudhuri, No. 16-16442, 2017 WL 3611433 (9th Cir. June 15, 2017).

508. *See* Jamul Action Com. v. Stevens, No. 17-16655 (9th Cir.).

the Poarch Band's tax liability for its trust land.<sup>509</sup> This litigation involved the same three tribal properties at issue in *PCI Gaming Authority*, acquired in trust in 1984, 1992, and 1995.<sup>510</sup> The County sought to levy property taxes against the Poarch Band's trust land, arguing that the lands were improperly taken into trust because Poarch had not been under federal jurisdiction in 1934 and, accordingly, they remained fee lands.<sup>511</sup> Poarch filed suit to enjoin the County from levying the property tax.<sup>512</sup> The district court relied on its prior decision granting a preliminary injunction, affirmed by the Eleventh Circuit, as well as the holding in *PCI Gaming Authority*, to grant a permanent injunction and declaratory relief prohibiting the County from assessing taxes on Poarch's trust property.<sup>513</sup> In effect, this decision reaffirmed that neither a state nor county may collaterally attack Departmental fee-to-trust decisions outside the APA framework and six-year statute of limitations.

### 3. State Gaming Laws

In Massachusetts, a non-Indian casino development company, KG Urban Enterprises, sued the Governor of Massachusetts and the Massachusetts Gaming Commission (collectively "Massachusetts" or "the

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509. See *Poarch Band of Creek Indians v. Hildreth*, No. 15-277, 2015 WL 4469479 (S.D. Ala.) (granting preliminary injunction against the Escambia County Tax Assessor), *aff'd*, 656 Fed. Appx. 934 (11th Cir. 2016); *Poarch Band of Creek Indians v. Moore*, No. 15-277, 2016 WL 10807587 (S.D. Ala.) (final order granting permanent injunction and declaratory judgment against the Escambia County Tax Assessor).

510. See *Poarch Band of Creek Indians*, 656 Fed. Appx. at 937.

511. See *Poarch Band of Creek Indians*, 2015 WL 4469479 at \*2.

512. *Poarch Band of Creek Indians*, 2016 WL 10807587 at \*2.

513. See *id.* at \*4. The District Court granted the Tribe's requested relief even though the Escambia County Tax Assessor had since withdrawn his opposition to the injunction, arguably mooting the controversy. *Id.* at \*2. While the County's change of position may have been partially fueled by change of personnel in the Escambia County Tax Assessor role, it was certainly also prompted by the related outcome in *PCI Gaming Auth.*, *supra* note 499. *Poarch Band of Creek Indians*, 2016 WL 10807587 at \*4. In any event, the District Court entered the declaratory judgment and permanent injunction, finding this relief will "inevitably serve a 'useful purpose' to settle the Tribe's inherent sovereignty and freedom from local property taxes and will 'afford relief' from any future uncertainty that this issue will be revisited." *Id.* at \*5.

Commonwealth”), alleging that the Commonwealth’s gaming law and licensing procedures violated the U.S. Constitution by creating a racial preference for Indian tribes in the state.<sup>514</sup> Although the plaintiff’s claims were grounded in the Fourteenth Amendment’s Equal Protection Clause, they implicated *Carcieri* to the extent the Commonwealth argued that its special treatment of tribal gaming applicants was authorized by Congress, and therefore justified by Supreme Court precedent in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*.<sup>515</sup> In order for the State to invoke *Yakima*, however, it had to show that it was acting pursuant to federal law, which in this case was IGRA.<sup>516</sup> Yet IGRA could only provide the necessary federal hook if the tribal license preference was for proposed gaming on “Indian lands.” At the time of litigation, the First Circuit found there were no qualifying “Indian lands” in Massachusetts, although the Mashpee Tribe had a fee-to-trust application pending with the Department of the Interior.<sup>517</sup> The plaintiff argued that because both of Massachusetts’ federally recognized tribes—the Wampanoag Tribe of Gay Head (“Aquinnah”) and the Mashpee Tribe—were recognized *after* 1934, the Department lacked authority under *Carcieri* to acquire trust land for their benefit; therefore, neither tribe could qualify for gaming under IGRA, resulting in the unconstitutionality of the tribal preference in the state gaming law.<sup>518</sup>

In vacating the district court’s dismissal of plaintiff’s complaint, the First Circuit issued a rather opaque decision holding that the plaintiff’s *Carcieri*-based claim has sufficient merit to survive a motion to dismiss. The First Circuit agreed with plaintiff that neither Mashpee nor Aquinnah

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514. *KG Urban Enter. v. Patrick*, 693 F.3d 1 (1st Cir. 2012) (upholding the district court’s denial of preliminary injunction but vacating the district court’s dismissal of complaint and remanding for further proceedings); *KG Urban Enter. v. Patrick*, No. 11-12070, 2014 WL 108307 (D. Mass.) (2014) (granting summary judgment to the defendants).

515. *KG Urban Enter.*, 693 F.3d at 20-21. *Yakima* holds that states may step into the shoes of the federal government when enacting legislation that singles out Indian tribes, and such state legislation does not trigger strict scrutiny under the Equal Protection Clause when the state does so pursuant to federal authorization. *See generally* *Washington v. Confed. Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979).

516. 693 F.3d at 19-21.

517. *Id.* at 21; *See also supra* Section III(b)(iii)(c).

518. 693 F.3d at 12, 20, and 22-23.

were federally recognized in 1934, and the court described the *Carcieri* question as both a “serious issue” and the plaintiff’s “strongest argument.”<sup>519</sup> The First Circuit essentially found that while the Commonwealth may arguably claim a valid tribal preference as authorized by IGRA, this argument “become[s] weaker with the passage of time and the continuation of the status that there are no ‘Indian lands’ in the region.”<sup>520</sup> In other words, the longer the Commission waited for a Massachusetts tribe to acquire trust lands that qualify for IGRA gaming, the more unlikely that IGRA actually applied and authorized the Commonwealth and Commission to implement a tribal licensing preference. Ultimately, however, the strength and scope of plaintiff’s *Carcieri*-related argument was not tested by the courts. Between the First Circuit’s decision and the district court’s decision on remand, the Massachusetts Gaming Commission opened the licensing application process to all commercial applicants, tribal or not.<sup>521</sup> Accordingly, the district court found that the 18 months between passage of the Massachusetts Gaming Act and the opening of the commercial application process to any applicant was a constitutionally permissible amount of time.<sup>522</sup> As a result, the district court did not need to evaluate whether a continued tribal preference would have been justified under IGRA by the likelihood that either Massachusetts tribe would be able to acquire trust land in light of *Carcieri*.<sup>523</sup>

There are two takeaways from these rulings on collateral *Carcieri* claims. First, *Carcieri* has the potential to create or bolster claims far

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519. *Id.* at 11, 22.

520. *Id.* at 24-25; *See also KG Urban Enter.*, 2014 WL 108307 at \*4 (“Although the First Circuit’s guidance to this district court, and perhaps others, is inscrutable, a careful reading yields a consistent rationale for its decision: despite not being fully authorized by the IGRA, the Massachusetts statute can be considered a “valid parallel mechanism” to the IGRA and, therefore, warrants rational basis review for a ‘limited period of time.’”) (quoting the First Circuit decision in *KG Urban*).

521. *KG Urban Enter.*, 2014 WL 108307 at \*15–16.

522. *Id.* at \*15-17. The District Court also determined that the review criteria for the application process did not, on its face or as applied, constitute a racial preference. *Id.* at \*18-32.

523. *Id.* at \*17-18 (“Because the Court finds that the Commission’s opening of the commercial application process frames the applicable time period, it need not speculate as to the ultimate resolution of the so-called *Carcieri* question with respect to the rights of the Mashpee or Aquinnah tribes to take land into trust. Any lingering uncertainty with respect to the Mashpee tribe’s eligibility is immaterial.”) (internal citation omitted).

outside the traditional APA fee-to-trust decision setting. It seems any creative lawyer can finesse an argument that lands do not amount to “Indian country” or a tribe does not constitute a “real” tribe on the basis of *Carcieri*, regardless of the particular facts or claims at issue. Second, and more reassuringly, courts appear reluctant to allow parties, even states, to challenge decades old fee-to-trust decisions outside of the APA.

## VI. LOOKING TO THE FUTURE: *CARCIERI*’S ONGOING IMPACTS AND POTENTIAL SOLUTIONS

Given the tremendous amount of activity that has occurred in the wake of *Carcieri*’s issuance in 2009, it is unsurprising that much remains to be resolved. In this section, we attempt to summarize the major *Carcieri*-related actions that are on the horizon, offering our perspectives on what may come and providing advice for tribal leaders and practitioners as they continue to pursue important trust land objectives.

### A. *The Future of Legislative Action*

Clean *Carcieri* fixes did not advance in the 115th Congress nor did any Senator even introduce a clean fix in the Senate. In the House, Congressman Cole again introduced a clean fix, which was referred to subcommittee but no action was taken.<sup>524</sup> In an interesting twist, a controversial bill to revise the Federal acknowledgment process was amended by Representative Grijalva to include a retroactive *Carcieri* fix.<sup>525</sup> The revised bill was reported favorably out of committee, but did not pass the House.<sup>526</sup>

The House of Representatives Subcommittee on Indian, Insular and Alaska Native Affairs held a general land-into-trust hearing on July 13, 2017, where it was again apparent that the Republican majority opposed the existing fee-to-trust process and Interior’s response to *Carcieri*.<sup>527</sup> The hearing memorandum asserted: “[f]or decades the

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524. H.R. 130, 115th Cong. (introduced Jan. 3, 2017).

525. Tribal Recognition Act, H.R. 3744, 115th Cong. (introduced Sept. 12, 2017).

526. H.R. REP. NO. 115-953 (2018).

527. *Comparing 21st Century Trust Land Acquisition with the intent of the 73rd Congress in Section 5 of the Indian Reorganization Act: Oversight Hearing*



secretary has acquired land in trust regardless of the impact on other tribes, state local governments, and landowners, and regardless of the capacity of the government to manage the trust lands.”<sup>528</sup> The memorandum criticized the IRA’s lack of “limits, standards, or guidelines” on the Secretary’s power to acquire land in trust, and that “[d]espite *Carcieri*,” M-Opinion 37029 “enable[d] the Secretary . . . to acquire land in trust for tribes recognized after 1934.”<sup>529</sup> The Interior representative at the hearing, Associate Deputy Secretary Jim Cason, also expressed concern about the impact of fee-to-trust on local communities, and speculated, without any specific examples, that tribes could seek land in trust for one purpose, only to initiate a different purpose, *i.e.* gaming, once the land was in trust.<sup>530</sup> Regarding *Carcieri*, Cason expressed concern: “the criteria [in M-37029] is very wide and it doesn’t respond very particularly to the Supreme Court decision. So we have concerns about the current advice in the Solicitor’s Opinion, about being specific enough to actually distinguish between

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*Before the H. Subcomm. On Indian, Insular and Alaska Native Affairs*, 115th Cong. 1, (July 13, 2017) [hereinafter Comparing 21st Century Trust Land Acquisition Oversight Hearing].

528. *Id.*, Mem. from Majority Comm. Staff, Subcomm. On Indian, Insular and Alaska Native Affairs to All Subcommittee on Indian, Insular and Alaska Native Affairs Members, [https://republicans-naturalresources.house.gov/uploadedfiles/hearing\\_memo\\_--\\_ov\\_hrg\\_07.13.17.pdf](https://republicans-naturalresources.house.gov/uploadedfiles/hearing_memo_--_ov_hrg_07.13.17.pdf).

529. *Id.* at 4. M-37029 was also the subject of attack at an oversight hearing of the House Committee on Natural Resources, Subcommittee on Oversight and Investigations hearing on May 24, 2017. The Hearing Memo states “[i]nstead of applying the IRA on its plainly-read terms as directed by the Supreme Court, [M-Opinion 37029] . . . provides DOI’s own opinion and focus of the Court’s holding in *Carcieri* to ultimately justify accepting land into trust on behalf of tribes that were not formally recognized by 1934.” Mem. from Majority Staff, Subcomm. On Oversight and Investigations to All Subcomm. Members, *Oversight Hearing: Examining Impacts of Federal Natural Resources Laws Gone Astray* (May 22, 2017), [https://republicans-naturalresources.house.gov/uploadedfiles/hearing\\_memo\\_--\\_ov\\_hrg\\_on\\_05.24.17.pdf](https://republicans-naturalresources.house.gov/uploadedfiles/hearing_memo_--_ov_hrg_on_05.24.17.pdf).

530. Comparing 21st Century Trust Land Acquisition Oversight Hearing, *supra* note 527 (statement of James Cason, Acting Deputy Sec’y).

applications.”<sup>531</sup> Cason did not commit to endorsing a *Carcieri* fix but did note that a fix would “simplify matters.”<sup>532</sup>

On January 9, 2019, at the start of the 116th Congress, Congressman Cole again introduced a clean *Caricieri* fix, which has been referred to the House Committee on Natural Resources.<sup>533</sup>

### 1. *Tribe Specific Fixes*

Despite congressional paralysis on a nationwide *Carcieri* fix, Congress actively considered several targeted, tribe or parcel specific bills in the 115th Congress. The House of Representatives alluded to this approach in 2014 when it passed the Gun Lake Act, noting that, because of the lack of consensus regarding how to fix *Carcieri*, “consideration of bills to take specific lands in trust, as long as they have the support of the elected representatives for the affected lands, tribes, and communities, is the appropriate means of resolving trust land matters.”<sup>534</sup>

Several tribe-specific fee-to-trust bills related to *Carcieri* were considered by the 115th Congress. For example, members of both the Senate and the House introduced bills to “ratify and confirm” Interior’s 2015 trust land acquisition for Mashpee.<sup>535</sup> These bills tracked language in the Gun Lake Act, which “ratified and confirmed” the Secretary’s trust acquisition decision for the Gun Lake Band.<sup>536</sup> The two Democratic Senators from Rhode Island sent a letter to Senate Minority Leader Charles

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531. *Trump Administration backs away from yet another pro-tribal legal opinion*, INDIANZ (July 25, 2017), <https://www.indianz.com/News/2017/07/25/trump-administration-backs-away-from-yet.asp>.

532. *Indian County outnumbered at hearing on Indian Reorganization Act*, INDIANZ (July 13, 2017), <https://www.indianz.com/News/2017/07/13/indian-country-outnumbered-at-hearing-on.asp>.

533. H.R. 375, 116th Cong. (introduced Jan. 9, 2019).

534. H.R. REP. NO. 113-590 at 3.

535. Mashpee Wampanoag Tribe Reservation Reaffirmation Act, S. 2628, 115th Cong. (introduced Mar. 22, 2018); Mashpee Wampanoag Tribe Reservation Reaffirmation Act, H.R. 5244, 115th Cong., (introduced Mar. 9, 2018). It is unclear how Interior’s recent decision, finding that the Mashpee Tribe was not under federal jurisdiction in 1934, might impact trust acquisition legislation for Mashpee. *See infra* Section V(b); Letter from Assistant Sec’y for Indian Affairs Tara Sweeney to Chairman Cedric Cromwell, Mashpee Wampanoag Tribe (Sept. 7, 2018) [hereinafter *2018 Mashpee Remand Decision*].

536. *Id.*

Schumer in July 2018 threatening to use “all avenues to block this legislation if there is an attempt to move it,” and arguing that it would circumvent the *Carcieri* decision for and open the door to Rhode Island tribes seeking similar legislation.<sup>537</sup> The letter is notable in that it demonstrates the significant controversy surrounding *Carcieri* fix legislation even among Democrats. The letter also misses the mark—the Mashpee Bill and the Gun Lake Act were specifically tailored to specific land that was already in trust. And the broader *Carcieri* fixes considered by Congress do not guarantee trust land acquisition, rather, they simply resolve the statutory authority requirement of a fee-to-trust decision. Even if a clean *Carcieri* fix is passed, Interior will still be required to carefully consider the interests of state and local governments and any environmental impacts, among other criteria.

Congressman Byrne introduced a bill to reaffirm the status of lands held in trust for the Poarch Band in the House of Representatives.<sup>538</sup> The Poarch bill passed the House, and was referred to the Senate, but not passed. The House also passed a bill to ratify and confirm the actions of Interior in acquiring approximately 1400 acres of land in trust for the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California (“Chumash”), which again was referred to the Senate.<sup>539</sup> The Chumash bill included a prohibition on gaming.<sup>540</sup> It did not pass the Senate. Each of these tribes has been the subject of litigation seeking to

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537. Letter from Senator Jack Reed and Senator Sheldon Whitehouse to Senator Charles Schumer (July 11, 2018), [https://twit-media.washtimes.com/media/misc/2019/01/10/Ltr\\_from\\_ReedWhitehouse\\_to\\_Schumer\\_on\\_Mashpee\\_7.11.2018.pdf](https://twit-media.washtimes.com/media/misc/2019/01/10/Ltr_from_ReedWhitehouse_to_Schumer_on_Mashpee_7.11.2018.pdf).

538. Poarch Band of Creek Indians Land Reaffirmation Act, H.R. 1532, 115th Cong. (introduced March 15, 2017). Noting the Poarch Band had to defend against *Carcieri* challenges to its trust land, the House Natural Resources Committee Report attacked Interior’s response to *Carcieri* and M-37029, noting that, “rather than work with the Committee to find a resolution to *Carcieri*, the Obama Administration increased the potential for litigation over the trust status of untold acres of lands owned by tribes.” H.R. REP. NO. 115-513, at 2, 115th Cong. (2018).

539. Santa Ynez Band of Chumash Indians Land Affirmation Act, H.R. 1491, 115th Cong. (Mar. 10, 2017).

540. *Id.*

invalidate the trust transfers on the basis that the tribes were not under federal jurisdiction in 1934.<sup>541</sup>

In addition, Congress considered, but did not enact, two bills to acquire land in trust for tribes that would eliminate the need for *Carcieri* determinations for specific trust acquisitions. The first bill, the Lytton Rancheria Homelands Act, would have taken certain land in trust for the Lytton Rancheria of California (“Lytton”), and prohibited gaming on the property.<sup>542</sup> Opponents to the trust acquisition argue that *Carcieri* forecloses trust acquisitions for Lytton,<sup>543</sup> and the legislation would have resolved the *Carcieri* question by mandating the trust acquisition. The Lytton Act also would have adopted a memorandum of agreement between the tribe and the county governing land use regulation.<sup>544</sup> The Lytton Act passed the House but did not pass the Senate. Additionally, Congressman Rick Larsen introduced a bill to acquire 97 acres of land in trust for the Samish Indian Nation (“Samish”).<sup>545</sup> At the time the legislation was introduced, a *Carcieri* determination for Samish remained pending with Interior, and, as is the case for Lytton, the legislation would have resolved the question of statutory authority, at least for the 97 acres.<sup>546</sup> The Samish bill would have prohibited gaming on lands acquired pursuant to the bill.<sup>547</sup> It died in subcommittee.

As of mid-January 2019, only one tribe-specific bill to address *Carcieri* had been introduced in the 116th Congress. On January 8, 2019,

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541. See Sections IV(viii)(a) and IV(b)(i), *supra*, Anne Crawford-Hall v. United States, No. 17-1616, In Chambers Order Granting Def.’s Partial Mot. to Dismiss (C.D. Cal. May 31, 2018) (rejecting *Carcieri* challenge to 1400 acre-trust acquisition for Santa Ynez Band of Chumash Decision for failure to exhaust administrative remedies).

542. Lytton Rancheria Homelands Act of 2017, H.R. 597, 115th Cong., §§ 4, 5 (Jan. 20, 2017).

543. Michael Robison and Mike Healy, *Close to Home: Future of Lytton tribe’s land is not inevitable*, THE PRESS DEMOCRAT (Sept. 6, 2015), <http://www.pressdemocrat.com/opinion/4435433-181/close-to-home-future-of>.

544. *Id.* at § 6.

545. Samish Indian Nation Land Conveyance Act, H.R. 2320, 115th Cong. (May 3, 2017).

546. *Legislative Hearings on H.R. 212, H.R. 2320, H.R. 3225 Before the Subcomm. on Indian, Insular, and Alaska Native Affairs*, 115th Cong. (Nov. 15, 2017) (statement of John Tahsuda, III, Acting Assistant Sec’y for Indian Affairs).

547. H.R. 2320, § 5.

Representative William Keating from Massachusetts introduced a bill to reaffirm the trust status of land Interior acquired in trust for Mashpee.<sup>548</sup>

In sum, upon examination of recent congressional activity on *Carcieri*, several themes become apparent. First, Congress is less likely to enact a clean *Carcieri* fix than ever before. No Senator even introduced a *Carcieri* bill during the 115th Congress. And no hearings were held on the two *Carcieri* fixes pending in the House. Even though the Democrats took control of the House of Representatives, the last time Democrats had a majority in both houses, they were unable to pass a clean *Carcieri* fix. At most, if one is introduced, a clean *Carcieri* bill could pass the House, but it would likely be dead on arrival in the Republican-controlled Senate. Second, certain House Republicans strongly oppose Interior's approach to *Carcieri*, as evidenced by comments in hearing memoranda and committee reports.<sup>549</sup> These Republicans are of the view that *Carcieri* requires "recognition" in 1934, and that tribes like the Gun Lake Band who went through the Federal acknowledgment process cannot meet this requirement.

Third, the congressional debate about *Carcieri* is in reality a debate about the land-into-trust process, and what Republicans (and sometimes Democrats) see as overreach by Interior and a disregard of state and local government and community interests. Senator Barrasso previously coupled *Carcieri* with significant changes to the fee-to-trust process, and other members of Congress have insisted that other changes to the fee-to-trust process, including limits on the Secretary's discretion, are necessary.

Fourth, although Congress has enacted one-tribe specific *Carcieri* bill, and progress has been made on others, these tribe-specific bills have significant limitations. The Samish, Chumash and Lytton bills, for example, prohibited gaming. Permanent restrictions on land use undermine self-determination; tribes, like other governments, have the inherent right to make their own decisions about the best use of the land they own and/or land over which they exercise jurisdiction.<sup>550</sup> In addition, all three bills authorize specific land acquisitions, and do not resolve *Carcieri* questions for other acquisitions. The Poarch and Gun

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548. To reaffirm the Mashpee Wampanoag Tribe reservation, and for other purposes, H.R. 312, 116th Cong. (introduced Jan. 8, 2019).

549. See *supra* Section III(a).

550. See, e.g., Exec. Order 13175: Consultation and Coordination with Indian Tribal Gov'ts, 65 Fed. Reg. 67249 (Nov. 9, 2000).

Lake bills are backwards looking only, as they fail to authorize new trust acquisitions.

Finally, these bills fall short in establishing finality and clarity regarding tribal trust lands. The Gun Lake Act, enacted to *end* years of litigation and uncertainty about the status of the tribe's trust land, was challenged all the way to the Supreme Court. Moreover, the Indian Land Consolidation Act, enacted in 1983, extended Section 5 trust acquisition authority to tribes who had voted against the application of the IRA in order to avoid piecemeal fee-to-trust legislation.<sup>551</sup> Yet, 35 years later, Congress has reversed course, again returning to tribe and parcel specific legislation.

In our view, the last ten years of *Carcieri* litigation and congressional debates only serve to underscore the need for a universal, clean *Carcieri* fix. Linking *Carcieri* and fee-to-trust has resulted in wasted Congressional hearings, never-ending litigation, and the expenditure of tribal, federal, and state/local government resources that could be better spent providing essential services. There are legitimate discussions to be had about jurisdictional and taxation issues associated with trust acquisition, but *Carcieri* has not provided, and will not provide, the appropriate framework in which to discuss those issues. We recognize the tension between arguing that Congress must enact a clean *Carcieri* fix and explaining why such a fix is unlikely. Yet the existing alternatives—to give up and accept the status quo, or to allow the vocal few who oppose all trust applications as a matter of course dictate the terms of a *Carcieri* fix—are even worse. The better, and in our view, necessary, path forward is to enact a clean *Carcieri* fix, and then separately discuss changes to the fee-to-trust process with the conversation led by tribes.<sup>552</sup>

### B. Future Interior Action

As explained *supra*, Sections III(b) and IV, during the Obama administration Interior responded to *Carcieri* in several different ways.

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551. 25 U.S.C. § 2202; H.R. REP. NO. 97-908, at 13 (1982).

552. For example, in comments on Interior's proposed changes to the fee-to-trust regulations, discussed in Section V(b), *infra*, NCAI has proposed a larger conversation about regulatory changes to the fee-to-trust process, beginning with a study of land acquisition needs in Indian country. Letter from NCAI Exec. Dir. Jacqueline Pata to Sec'y Zinke (Nov. 30, 2017), [http://www.ncai.org/12.4.17\\_NCAI\\_Letter\\_to\\_DOI\\_re\\_Part\\_151\\_Regulation\\_Proposal.pdf](http://www.ncai.org/12.4.17_NCAI_Letter_to_DOI_re_Part_151_Regulation_Proposal.pdf).

Interior consistently supported a clean Congressional fix to *Carcieri*. Interior also established a “bright-line test” that if the Secretary held a Section 18 election at a tribe’s reservation, that tribe was under federal jurisdiction in 1934 without any additional analysis. For those tribes who did not vote in a Section 18 election on whether to accept or reject the IRA, Interior developed a two-part framework for determining whether the tribe was under federal jurisdiction in 1934. This test, first set forth in a fee-to-trust decision for Cowlitz, was institutionalized with the issuance of M-Opinion 37029 in March 2014. Interior also vigorously defended its *Carcieri* opinions in federal court. In addition, Interior considered whether other statutory provisions besides the first definition of Indian provided statutory authority for a trust acquisition, as in the case of Mashpee, UKB, Alaska tribes, and Oklahoma tribes. Although Interior did not issue regulations responding to *Carcieri*, Interior did promulgate regulations in response to the Supreme Court’s decision in *Patchak*. The “*Patchak* patch” eliminated a 30-day waiting period for fee-to-trust regulations and clarified and mandated exhaustion of administrative remedies.<sup>553</sup>

Two years into the Trump administration, Interior’s record on *Carcieri* is mixed.<sup>554</sup> The new administration has yet to support a *Carcieri* fix. Although Interior has not yet taken formal action to withdraw or modify M-37029, Associate Deputy Secretary Jim Cason has echoed the concerns of House Republicans and described it as “loose” and not sufficiently responsive to the Supreme Court’s decision in *Carcieri*.<sup>555</sup> Thus, it remains possible that Interior may seek to withdraw the M-Opinion altogether or introduce new requirements for being under federal jurisdiction in 1934.

One particular fee-to-trust acquisition has gained attention in the Trump administration. As noted above, the district court in *Littlefield*

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553. 78 Fed. Reg. 67928 (Nov. 13, 2013).

554. The current administration has recently issued a few positive *Carcieri* determinations in the context of fee-to-trust decisions. See, e.g., Assistant Secretary – Indian Affairs Decision, *Kramer v. Pac. Reg. Dir.*, (Feb. 25, 2019) (affirming the 2014 trust decision, and underlying analysis, for the Santa Ynez Band of Chumash Indians); *Snoqualmie Tribe Celebrates Land in Trust Decision*, (Feb. 13, 2019) <http://snoqualmietribe.us/content/snoqualmie-tribe-celebrates-land-trust-decision>.

555. *Trump Administration backs away from yet another pro-tribal legal opinion*, INDIANZ (July 25, 2017), <https://www.indianz.com/News/2017/07/25/trump-administration-backs-away-from-yet.asp>.

remanded the Mashpee fee-to-trust decision to Interior to issue a determination as to whether the Mashpee were under federal jurisdiction in 1934. On June 30, 2017, Associate Deputy Secretary Jim Cason shared a draft determination that, applying M-37029's two-part framework, the Mashpee Tribe was not under federal jurisdiction in 1934.<sup>556</sup> Rather than issuing a final decision, the Associate Deputy Secretary allowed the parties to submit briefing on whether the exercise of jurisdiction over the Tribe by Massachusetts could be a "surrogate" for federal jurisdiction.<sup>557</sup>

Following supplemental briefing, on September 7, 2018, the Department issued its final decision finding that the Mashpee Tribe was not under federal jurisdiction in 1934.<sup>558</sup> The Department, acting through Assistant Secretary—of Indian Affairs Tara Sweeney, concluded that there was insufficient evidence of specific federal actions towards the Mashpee before and during 1934.<sup>559</sup> It further rejected the Mashpee's argument that certain legislation and legal principles, such as the Non-Intercourse Acts and the United States' assumption of the British Crown's obligations, created federal jurisdiction over the Tribe by operation of law.<sup>560</sup>

The Mashpee remand decision does offer a scintilla of hope. First, it expressly declined to vacate the M-Opinion, as urged by the *Littlefield* plaintiffs.<sup>561</sup> Second, it did not adopt the position that a state's exercise of jurisdiction over a tribe implies the surrender of federal jurisdiction over that tribe.<sup>562</sup> Nonetheless, the decision rejected the Tribe's argument that

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556. Letter from Associate Deputy Sec'y Jim Cason to Chairman Cedric Cromwell, Mashpee Wampanoag Tribe (June 30, 2017).

557. *Id.* at 2.

558. *2015 Mashpee Remand Decision*, *supra* note 535.

559. *Id.* at 20–38.

560. *Id.* at 13–15.

561. *Id.* at 11, 13. The Remand Decision did, however, caveat its declination to vacate by saying that only the Solicitor, Deputy Secretary, or Secretary has the authority to modify an M-Opinion unless it is otherwise overruled by the courts. *Id.* at 11, 13.

562. Compare *id.* at 9 (summarizing plaintiffs' arguments that federal and state jurisdiction could not co-exist in the original 13 states) with *id.* at 16–20 (rejecting plaintiffs' broad assertion that the 13 original states maintained independent and exclusive authority over Indian affairs, instead analyzing whether Massachusetts's exercise of jurisdiction over Mashpee was coupled with federal participation or authorization).



Massachusetts' exercise of jurisdiction was a surrogate for federal jurisdiction due to the absence, in this particular case, of "any Federal authorization, confirmation or ratification of state authority, or delegation of Federal authority to the state."<sup>563</sup> The decision, and the potential for the United States to take the land out of trust and revoke its reservation status, has alarmed Indian country, with the National Congress of American Indians characterizing it as an attack on the Mashpee Tribe's sovereignty.<sup>564</sup>

One other Interior *Carcieri* opinion from the Trump administration bears mentioning. On November 9, 2018, BIA issued a determination to acquire 6.7 acres of land in trust for the Samish for non-gaming purposes.<sup>565</sup> As part of its decision, BIA applied the two-part *Carcieri* framework and concluded that Samish was under federal jurisdiction in 1934.<sup>566</sup> Like Cowlitz, Samish was recognized through the federal acknowledgment process, with the final acknowledgment decision issued in 1995.<sup>567</sup> In determining that the Samish were under federal jurisdiction in 1934, BIA relied on: the negotiation and entering into of the Treaty of Point Elliott of 1855; the federal government's course of dealings with the Samish and its members, including reporting Samish members in federal censuses; the granting of allotments to Samish members; federal attempts to exercise jurisdiction over Samish Indians living off-reservation; and federal approval of attorney contracts with the tribe.<sup>568</sup> The Samish *Carcieri* opinion raised several interesting issues. It considered a federal court decision that the modern Samish Tribe was not a successor in interest to the Samish that were party to the Treaty of Point Elliot and, accordingly, lacked off-reservation treaty fishing rights. The opinion found the court's determination legally distinct and not dispositive

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563. *Id.* at 20.

564. *NCAI: Mashpee Wampanoag Tribe 'stripped' of its sovereignty*, INDIANZ (Sept. 11, 2018), <https://www.indianz.com/News/2018/09/11/ncai-mashpee-wampanoag-tribe-stripped-of.asp>.

565. Letter from the Honorable Tom Wooten, Chairman, Samish Indian Nation (Nov. 9, 2018), <https://turtletalk.files.wordpress.com/2018/11/2018-11-09-final-fft-decision-reg-dir1.pdf>.

566. *Id.*, Attachment 1, <https://turtletalk.files.wordpress.com/2018/11/2018-11-09-attachment-1-to-fft-dec-samish-carcieri-analysis.pdf>.

567. *Id.* at 6-7.

568. *Id.* at 16-28.

of 1934 federal jurisdiction.<sup>569</sup> Similarly, the *Carcieri* opinion considered the evidentiary relationship between treaty rights litigation, the acknowledgment process, and *Carcieri*, determining that while the relevant evidence overlaps significantly, the legal outcome in one context does not dictate the outcomes for any other legal purpose.<sup>570</sup> Last, the *Carcieri* opinion found that evidence of federal officials omitting the Samish from lists of tribes under federal jurisdiction and listing individual Samish as members of other tribes was insufficient to revoke federal jurisdiction.<sup>571</sup>

Beyond case-by-case *Carcieri* determinations for individual tribes, the new administration has taken a different approach to land-into-trust than that of the Obama administration. From nearly the day that former Secretary Zinke was sworn in, he and his team expressed concerns and skepticism about the importance of trust land and the fee-to-trust process. On May 2, 2017, Secretary Zinke commented, “Is there an off-ramp? If tribes would have a choice of leaving Indian trust lands and becoming a corporation, tribes would take it.”<sup>572</sup> Shortly thereafter, Jim Cason delivered testimony to the House Subcommittee on Indian, Insular, and Alaska Native Affairs expressing concern about the negative impacts of off-reservation trust acquisitions on local communities.<sup>573</sup> At a hearing on October 4, 2017, then-Acting Assistant Secretary of Indian Affairs John Tahsuda III reiterated Cason’s concerns.<sup>574</sup> Tahsuda largely ignored any

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569. Swinomish Indian Tribal Community opposed the Samish application, and argued that, “because [United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979)] concluded that the Nation is not a successor to the Treaty of Point Elliott, it cannot be a successor entity to the treaty Samish.” *Id.* at 12. BIA rejected this argument, distinguishing between the requirements to establish treaty rights, acknowledgment under the federal acknowledgment process, and federal jurisdiction status in 1934. *Id.* at 16.

570. *Id.* at 12-16.

571. *Id.* at 30-31 (noting that “[s]uch inconsistencies are not uncommon, and do not in themselves demonstrate that the Samish Nation was not under federal jurisdiction”).

572. Secretary Zinke advocates ‘off ramp’ for taking lands out of trust, INDIANZ (May 3, 2017), <https://www.indianz.com/News/2017/05/03/secretary-zinke-advocates-offramp-for-ta.asp>.

573. Comparing 21st Century Trust Land Acquisition Hearing, *supra* note 527 (statement of James Cason, Acting Deputy Sec’y).

574. Doubling Down on Indian Gaming: Examining New Issues and Opportunities for Success in the Next 30 Years: Hearing Before the S. Comm. on

benefits to tribes from off-reservation trust acquisitions; rather, his focus was on the state and local government interests and impacts.<sup>575</sup>

That same day, Interior sent tribal leaders draft revisions to the off-reservation fee-to-trust regulations, and scheduled consultation sessions to discuss the proposed changes.<sup>576</sup> According to the Dear Tribal Leader letter, the goal of these changes would be to “provide Tribes with more certainty as to the possibility of an approval before expending significant resources.”<sup>577</sup> The changes would have created a two-step review and approval process for off-reservation acquisitions: an initial review and then a final review.<sup>578</sup> A determination whether a tribe was under federal jurisdiction in 1934, or other analysis of the statutory authority for the application, would not be completed until the second phase.<sup>579</sup> The changes also would have reintroduced the 30-day waiting period for trust land acquisition that had been eliminated by the Obama administration.<sup>580</sup>

Interior subsequently withdrew the draft in response to calls from tribes for additional consultation sessions, and issued a new consultation schedule.<sup>581</sup> The comment period closed on June 30, 2017.<sup>582</sup> Indian country communicated “near-universal opposition” to the proposed changes to the fee-to-trust process, noting, *inter alia*, that they would give an oversized role to the interests of state and local government, at the

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*Indian Affairs*, 115th Cong. (Oct. 4, 2017) (statement of John Tahsuda III, Acting Assistant Sec’y for Indian Affairs).

575. *Id.*

576. Letter from Acting Assistant Sec’y for Indian Affairs John Tahsuda III to Tribal Leaders (Oct. 4, 2017), [https://www.bia.gov/sites/bia\\_prod.opengov.ibmcloud.com/files/assets/as-ia/raca/pdf/DTLL - Trust Acquisition Revisions.pdf](https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/raca/pdf/DTLL - Trust Acquisition Revisions.pdf).

577. *Id.* at 1.

578. *Id.*

579. See Consultation Draft Part 151 – Land Acquisitions § 151.11(c)(2)(ii), (BIA Dep’t of Interior, Oct. 2017) <https://turtletalk.files.wordpress.com/2017/10/consultation-draft-trust-acquisition-revisions.pdf>.

580. Consultation Draft § 151.12(c)(2)(iii).

581. Letter from Acting Assistant Sec’y for Indian Affairs John Tahsuda III to Tribal Leaders (Dec. 6, 2017).

582. Letter from Principal Deputy Assistant Sec’y for Indian Affairs John Tahsuda III to Tribal Leaders (Feb. 15, 2018) [https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Updated\\_DTLL\\_02-15-18\\_FTT.pdf](https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Updated_DTLL_02-15-18_FTT.pdf).

expense of tribes and tribal communities.”<sup>583</sup> In response, the Assistant Secretary of Indian Affairs, Tara Sweeney, recently indicated that Interior will not move forward with the proposed regulatory changes at this time.<sup>584</sup> There is no guarantee that Interior will stay that course, however, or that it will not eventually modify through regulation or other agency action the fee-to-trust process, including changes that address *Carcieri*.

Significantly, however, with the exception of the Mashpee fee-to-trust decision relying on the IRA’s second definition of “Indian,” the United States has continued to defend the fee-to-trust decisions, including the *Carcieri* opinions, of the Obama administration. The United States has filed briefs and participated in oral argument before federal courts in the North Fork, Enterprise, Ione, Oneida, Wilton, Chumash, UKB, and Cowlitz cases.

### C. Pending *Carcieri* Litigation

As already discussed in Section IV(a), there are a number of fee-to-trust cases pending in federal court.

The litigation on a non-gaming trust acquisition for UKB is currently before the Court of Appeals for the Tenth Circuit.<sup>585</sup> The *Carcieri* claim in this litigation does not concern an actual Departmental determination of federal jurisdiction in 1934, but rather concerns whether the Department is required to conduct a *Carcieri* analysis when relying upon authority in Section 3 of the OIWA to effectuate a trust transfer.<sup>586</sup> If the Tenth Circuit affirms, the Department will need to determine on remand whether the UKB was under federal jurisdiction in 1934. There is a similar case raising the same *Carcieri* question for OIWA Section 3,

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583. Letter from United South and Eastern Tribes Sovereignty Protection Fund to Acting Assistant Sec’y John Tahsuda III, at 1 (June 29, 2018), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/91-USET.pdf>.

584. See *Mashpee Wampanoag Tribe no longer being financed by backer of stalled casino*, INDIANZ (Mar. 4, 2019), <https://www.indianz.com/IndianGaming/2019/03/04/mashpee-wampanoag-tribe-no-longer-being.asp> (quoting Assistant Secretary Sweeney as saying “[a]fter reviewing the comments & hearing from Indian Country, the department has determined it will not propose new regulations at this time”).

585. *The Cherokee Nation v. Zinke*, Nos. 17-7042 & 17-7044 (10th Cir. 2017).

586. See *supra* Sections III(b)(iii)(a), IV(a)(vii).

pending in the District Court for the Northern District of Oklahoma, that concerns a proposed trust acquisition for UKB for gaming.<sup>587</sup> Given that merits briefing was completed over four years ago, it may be that the Northern District of Oklahoma is awaiting a final outcome in the Tenth Circuit before issuing its own decision on the merits.

Another case brought by Stand Up! is currently before the District Court for the District of Columbia.<sup>588</sup> This litigation involves a Department decision, made in the waning days of the Obama administration, to acquire trust land on behalf of the Wilton Rancheria, California (“Wilton”) for gaming purposes.<sup>589</sup> Stand Up!’s amended complaint raises a claim that Wilton was not a recognized tribe under federal jurisdiction in 1934, alleging that “the Rancheria was set aside for homeless Indians, not a recognized tribe, and there is no established connection between the Indians living on the Rancheria in 1934 and members of the Wilton Rancheria today.”<sup>590</sup> The arguments strongly echo those in the North Fork trust land litigation, also brought by Stand Up!, which were rejected by the same district court.

Most recently, Mashpee has filed a lawsuit in the United States District Court for the District of Columbia challenging the Department’s September 2018 determination that it was not under federal jurisdiction in 1934.<sup>591</sup> Mashpee alleges that Interior “failed to apply established law, contorting some of the relevant facts and ignoring others to engineer a negative decision.”<sup>592</sup> This case marks the first time a determination that a tribe was *not* under federal jurisdiction will be litigated.

While it is impossible, and unwise, to predict the outcome of particular cases, we expect that *Carcieri* will continue to fuel challenges

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587. See *The Cherokee Nation v. Jewell*, No. 12-493, 2017 WL 2352011 (N.D. Okla. 2014).

588. See *Stand Up for California! v. U.S. Dep’t of Interior*, 315 F. Supp. 3d 289 (D.D.C. 2018).

589. See *Trust Acquisition of 35.92 acres in the City of Elk Grove, California, for the Wilton Rancheria*, Rec. of Decision (BIA, Dep’t of Interior Jan. 2017), <http://www.wiltoneis.com/wp-content/uploads/2017/01/record-of-decision>.

590. See Amended Complaint for Declaratory and Injunctive Relief ¶¶ 86-91, *Stand Up for California!*, 315 F. Supp. 3d 289 (D.D.C. 2018) (No. 17-58).

591. *Mashpee Wampanoag Tribe v. Zinke*, No. 18-2242 (D.D.C. Sept. 27, 2018).

592. *Id.* ¶ 1.

to fee-to-trust decisions and may also be invoked in broader settings as time goes on.<sup>593</sup>

#### D. Newly Recognized Tribes

As described throughout this Article, tribes may become formally recognized by the federal government through two primary mechanisms: (1) administratively via the 25 C.F.R. Part 83 acknowledgment process; or (2) legislatively via specialized acts of Congress.<sup>594</sup> Tribes who have obtained any type of formal recognition since 1934 will continue to be particularly susceptible to legal challenges on the basis of *Carcieri*.

For legislatively recognized tribes, the degree of vulnerability regarding *Carcieri* depends greatly on the language of the act. Some legislation may independently provide land acquisition authority, negating the need to utilize IRA Section 5. For example, legislation recognizing six Virginia tribes in early 2018 specifically addressed trust land acquisitions.<sup>595</sup> For each tribe, the legislation specified guidelines and geographical boundaries for trust land acquisitions, mandating that upon tribal request, the Department must take into trust tribal fee land acquired before 2007 within certain geographic areas. Further, the legislation provided the Department discretionary authority to take in trust tribal fee lands acquired at any time (presumably after 2007) within those same

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593. See, e.g., Heidi Staudenmaier & Celene Sheppard, *Impact of the Carcieri Decision*, American Bar Association Gaming Law Gazette, Spring 2009, at 2-3, <http://apps.americanbar.org/buslaw/committees/CL430000pub/newsletter/200905/staudenmaier.pdf> (predicting that *Carcieri* could be invoked anytime the Department uses an IRA provision, beyond the land acquisition authority, or relies on the IRA definitions as they are used for other federal laws and programs).

594. See *supra* Sections III(b)(i) (describing the Cowlitz Tribe's 2002 acknowledgment through Part 83); III(b)(ii) (explaining the *Carcieri* M-Opinion's discussion on historical recognition versus modern recognition); III(b)(iii)(a) (describing the UKB's 1946 recognition act); and III(b)(iii)(b) (describing the Shawnee Tribe's 2000 recognition act).

595. Thomasina E. Jordan Indian Tribes of Va. Fed. Recognition Act of 2017, 115 Pub. L. 121, 132 Stat. 40 (Jan. 29, 2018) (recognizing the Chickahominy Indian Tribe, the Chickahominy Indian Tribe—Eastern Division, the upper Mattaponi Tribe, the Tappahannock Tribe, Inc., the Monacan Indian Nation, and the Nansemond Indian Tribe).

geographic areas.<sup>596</sup> The Act expressly excludes these lands from gaming.<sup>597</sup> Yet the Act does not address whether the six tribes may acquire trust land outside the specified geographic boundaries pursuant to other legal authority, *i.e.* IRA Section 5 and the Part 151 regulations.

Other recognition acts may not provide independent authority for trust land acquisitions, but instead more generally apply all the privileges and benefits of the IRA to the subject tribe. It should be argued that such privileges and benefits include Section 5, the capstone of the IRA, even if the recognition act does not expressly state as much.

Tribes acknowledged through Part 83 may face even more significant challenges since they lack the benefit of express congressional action, including congressional guidance or independent authority for fee-to-trust acquisitions. It is important to remember, however, that the standard for Part 83 acknowledgement necessarily reflects longstanding tribal existence and the lengthy acknowledgment records include important evidence of federal interactions with the tribal entity, all of which may support a positive departmental finding of 1934 jurisdiction and/or rebut *Carcieri*-related claims by opponents.<sup>598</sup>

#### *E. Practice Tips for Tribal Attorneys*

The last ten years of *Carcieri* offers several takeaways for tribes and tribal attorneys. Accordingly, as we look to *Carcieri*'s future impact, we have compiled ten practice tips.

- (1) All tribes have a *Carcieri* problem—not just newly recognized tribes, tribes in certain regions, or tribes who lack an existing land base. Regardless of tribal history, and the strength of evidence supporting jurisdiction, *Carcieri* can and often is raised by

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596. *Id.* §§ 106, 206, 306, 406, 506, 606.

597. *Id.* §§ 106(d), 206(d), 306(d), 406(d), 506(d), 606(d).

598. *See* 25 C.F.R. § 83.11 (requiring, among other criteria, that the petitioner has been identified as an American Indian entity on a substantially continuous basis since at least 1900, the petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present, and that petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the present). *See also Carcieri* M-Opinion, *supra* note 56, at 25 (finding that “[e]vidence submitted during the regulatory Part 83 acknowledgment process thus may be highly relevant and may be relied on to demonstrate that a tribe was under federal jurisdiction in 1934”).

opponents during the agency decision-making process and in subsequent litigation. Following *Carcieri*, Interior must conduct case-by-case inquiries into statutory authority, carefully considering whether the tribe was under federal jurisdiction in 1934, or whether some other section of the IRA or tribe-specific statute authorizes a trust acquisition. Therefore, be prepared at the onset of the fee-to-trust process to provide historical evidence and legal analysis supporting your tribe's jurisdictional status or other statutory authority.

- (2) Think outside the box when looking for a statutory basis for a fee-to-trust acquisition. Consider relying on more than the IRA's first definition of Indian, or even more than one statute, to support a fee-to-trust acquisition.<sup>599</sup> Consider whether the OIWA, tribal restoration acts, or other authorities constitute an appropriate legislative hook—explicitly or implicitly—to provide tribes access to the land acquisition authority set out in the IRA. Alternatively, these authorities may provide trust land acquisition authority that is separate and independent from the IRA altogether.<sup>600</sup>
- (3) If the first definition of “Indian” is the only option for statutory authority, consider relying on more than just one piece of evidence. As demonstrated above, certain evidence Interior views as dispositive, such as entering into treaties or voting in a Section 18 election, has still been challenged in federal court litigation. So, for example, if your tribe entered into treaties with the federal

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599. For example, in a trust acquisition decision for the Tunica-Biloxi Tribe of Louisiana, Interior relied on both the first and second definitions of “Indian” in the IRA to conclude that it had statutory authority to acquire the parcel at issue in trust. *Trust Acquisition of 703.26 Acres in Avoyelles Parish, Louisiana for the Tunica-Biloxi Tribe*, Decision Letter (BIA, Dep’t of Interior Aug. 11, 2011), <https://turtletalk.files.wordpress.com/2012/08/tunica-biloxi-carcieri-ruling-from-interior.pdf>.

600. For example, in a trust acquisition decision for the Pokagon Band of Potawatomi Indians, Interior relied on the Pokagon Restoration Act as independent statutory authority. *Trust Acquisition of 165.81 Acres in the City of South Bend, Indiana, for the Pokagon Band of Potawatomi Indians, Michigan and Indiana*, Rec. of Decision 61 (BIA, Dep’t of Interior Nov. 2016), <https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc2-056228.pdf>.



government, the United States provided numerous services to your tribe and its members in the years leading up to the IRA, and your tribe voted on the IRA, include all of the above in your *Carcieri* submission, particularly if you expect the fee-to-trust decision may be challenged. In several recent decisions, Interior has concluded that Section 18 votes are dispositive, but went on to note the existence of other evidence as well.<sup>601</sup>

- (4) In providing an analysis to Interior of why your tribe was under federal jurisdiction in 1934, cite to, and apply, Interior's two-part framework. Referencing and incorporating the framework will stage your arguments in a way that is easily understood by agency personnel, streamlining the process. Moreover, considering the M-opinion while assembling your *Carcieri* submission will help you identify relevant evidence.
- (5) Familiarize yourself with the body of Interior *Carcieri* opinions that have already been issued for other tribes. You can likely pull successful legal arguments and analogous fact scenarios from these decisions. Conversely, you will avoid wasting time on previously rejected arguments. We have tried to include citations to many of these decisions throughout this article. In addition, you can search the website of the IBIA, available at <https://www.doi.gov/oha>, for their decisions on *Carcieri* matters.

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601. See, e.g., *Trust Acquisition of 35.92 acres in the City of Elk Grove, California, for the Wilton Rancheria*, Rec. of Decision 71–72 (BIA, Dep't of Interior Jan. 2017), <http://www.wiltoneis.com/wp-content/uploads/2017/01/record-of-decision.pdf>. (relying on the Section 18 election and a land acquisition for the tribe in 1927, alone or together); *Trust Acquisition of the Horseshoe Grande Site in Riverside County, California, for the Soboba Band of Luiseno Indians, California*, Rec. of Decision 454–456 and n.33 (BIA, Dep't of Interior, May 2015), <https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-030437.pdf> (relying on the Section 18 election as dispositive, but also noting a wealth of other evidence of federal jurisdiction); *Trust Acquisition of 61.83 acres in Sonoma County, California, for the Cloverdale Rancheria of Pomo Indians of California*, Rec. of Decision 51–52 (BIA, Dep't of Interior Apr. 2016), <https://www.bia.gov/sites/bia.gov/files/assets/public/oig/pdf/idc1-033914.pdf> (relying on the Section 18 election as dispositive but also relying on the acquisition of the Cloverdale Rancheria in 1921).

- (6) If you expect opposition to your acquisition, try to anticipate and rebut the arguments of your opponents. For example, if you are aware of statements by federal officials that the federal government did not have any responsibilities to your tribe, be prepared to show why these statements cannot overcome other indicia of federal jurisdiction prior to and in 1934. Or, if there is a long period during which the federal government did not take affirmative actions towards your tribe, be prepared to provide the historical context, or rely on arguments in the M-Opinion as to why such inaction did not and could not terminate federal jurisdiction. Do not assume (or hope) that these arguments will not be raised. Moreover, it strengthens the integrity of your analysis if you concede and address counterpoints upfront, rather than being perceived by agency staff as “hiding the ball.” Be prepared to answer difficult questions by agency staff. In addition, if an opponent files a lengthy submission arguing that your tribe was not under federal jurisdiction in 1934, file a reply explaining why they are wrong. We recognize that this requires a significant expenditure of resources, but it is better to develop a strong record and address these issues upfront than having to confront them for the first time in litigation.
- (7) Be persistent with the Department. If you provided your submission and hear nothing for months or even years, regularly follow-up with the Solicitor’s Office, BIA, or the Assistant Secretary of Indian Affairs. Ask if they have any questions or need additional information. Schedule calls to check-in and request decision timelines. Build relationships with BIA and Solicitor’s Office staff to ensure your submissions are adequately covering issues/concerns that will be evaluated.
- (8) Do not evaluate your tribe’s history, or its relationship with the federal government, in a vacuum. Consider the larger historical and policy context(s), and whether such context explains any gaps or incongruities in the evidentiary record.
- (9) Remember that *Carcieri* is only one component of a fee-to-trust acquisition. As explained by Associate Deputy Secretary Jim Cason and Principal Deputy Assistant Secretary of Indian Affairs John Tahsuda, the Trump administration is very concerned about

the impacts of trust acquisitions on state and local governments. If you schedule a meeting with the Secretary's Office or the Assistant Secretary's Office to discuss a proposed acquisition, be prepared for questions about the views of state and local governments. Particularly for off-reservation acquisitions, if you have entered into an intergovernmental agreement with states and local governments regarding fee-to-trust, include that information in your fee-to-trust application. If you have not entered into such an agreement (and such agreements are not required by the existing regulations), we recommend that you be prepared to explain why. Relatedly, consider that many states and local governments do not make *Carcieri* arguments because they are actually invested in whether a tribe was under federal jurisdiction in 1934. As this article has demonstrated, it is often a convenient vehicle for them to attack fee-to-trust for other reasons.

- (10) Think beyond the Department of the Interior. The real fix, as explained *supra*, needs to come from Congress. Do not let your local representatives forget that *Carcieri* continues to present an enormous obstacle for tribes. If the substantial moral, historical, and practical reasons for a fix do not appear to move your representative, focus on the significant tribal and agency costs involved in determining, and then litigating, these *Carcieri* decisions. Tribes have had to hire expensive experts to compile historical reports, sometimes taking years to complete. Litigation has consumed tribal, Interior, and Department of Justice resources.

## VII. CONCLUSION

In 1994, Congress enacted changes to the IRA to ensure a policy of equality between federally recognized tribes. Congress prohibited Interior, and other federal agencies, from issuing *any* regulation or decision "that classifies, enhances, or diminishes the privileges and immunities available to [an] Indian tribe relative to other federally recognized Indian tribes by virtue of their status as Indian tribes."<sup>602</sup>

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602. See 25 U.S.C. § 5123(f), (g). Recently, the United States District Court for the District of Columbia interpreted section (f) broadly, rejecting an argument that it is limited to "powers of self-governance," and applying it to gaming

Consistent with this mandate, Interior has embraced the policy that “there should not be different classes of federally recognized tribes.”<sup>603</sup> Yet, as this Article has demonstrated, *Carcieri* means that there are some tribes who may be ineligible to have land taken into trust on their behalf—a reality that is irreconcilable with the sweeping purposes of the IRA.

Moreover, in the ten years since the Supreme Court decided *Carcieri*, countless hours and incredible sums of money have been channeled into its implementation and attempted correction. Congress has contemplated fifteen clean *Carcieri* fixes, in addition to tribe-specific fixes and a broader fee-to-trust overhaul, largely to no avail. Without a legislative fix, the Department has had to forge a path on its own, crafting extensive *Carcieri* guidance and continuing to process tribal fee-to-trust applications with its limited resources. Opponents to tribal trust land routinely challenge these decisions on the basis of *Carcieri* in scorched earth litigation, drawing out any finality regarding tribal lands and jurisdiction for years and years. Additionally, through its recent Mashpee determination and testimony before Congress, Departmental leadership has signaled a potential change of course in its *Carcieri* practice. This signal has alarmed tribes and advocates.<sup>604</sup>

Ultimately, it is up to Congress to resolve this problem. We hope that Congress will live up to its commitment of treating tribes indiscriminately and provide all tribes—regardless of factual specifics tethered to the year 1934—the ability to seek land in trust.

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activities. *The Koi Nation of Northern California v. U.S. Dep’t of Interior*, No. 17-1718, at 58 (D.D.C. Jan. 16, 2019).

603. See *Land Acquisitions in the State of Alaska*, 79 Fed. Reg. at 76890 (removing the Alaska exclusion from the Department’s fee-to-trust regulations).

604. *NCAI Objects to the Department of the Interior’s Decision on the Mashpee Wampanoag Tribe and Questions What It Means to the Future of Indian Country*, NCAI (Sept. 2018), <http://www.ncai.org/news/articles/2018/09/11/ncai-objects-to-the-department-of-the-interior-s-decision-on-the-mashpee-wampanoag-tribe-and-questions-what-it-means-to-the-future-of-indian-country>.